Indian Claims Commission

Canupawkpa Dakota First Nation

Report on: Turtle Mountain Surrender Claim

104-01691/

Indian Claims Commission

Commission des revendications des Indiens

October 2, 2003

Chief Philip Hi-Eagle
Canupawakpa Dakota First Nation

The Honourable Robert Nault
Minister of Indian Affairs and Northern Development

The Honourable Martin Cauchon
Minister of Justice and Attorney General of Canada

RE: Canupawakpa Dakota First Nation Inquiry – Turtle Mountain Surrender Claim

In May 2000, Canupawakpa Dakota First Nation wrote the Indian Claims Commission requesting an inquiry into its rejected Turtle Mountain Surrender claim. Three planning conferences were held October 17, 2000, February 15 and July 4, 2001. The inquiry continued with two community sessions, one held at Sioux Valley First Nation reserve and the second at Canupawakpa Dakota First Nation reserve, during which the Commissioners heard from elders regarding the First Nation's oral history. The Commission proceeded to oral submissions on October 22 and November 15, 2002, in Winnipeg, Manitoba.

A review of the facts of this claim, together with our legal analysis, findings, and recommendation to the parties, is set out in the attached report.

FOR THE INDIAN CLAIMS COMMISSION

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INDIAN CLAIMS COMMISSION

CANUPAWAKPA DAKOTA FIRST NATION INQUIRY

TURTLE MOUNTAIN SURRENDER CLAIM

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July 2003

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PART I

INTRODUCTION

OVERVIEW OF THE CLAIM

During the early 1860s, U.S. governmental policy led many Dakota First Nations to cross the international border into Canada and settle into the northern extremities of their traditional territory. The Dakota people had long held an allegiance to the British and, after a bitter conflict with the Americans, they began to travel northward. In 1862, a Dakota band under Chief Hdamani[1] moved north from Minnesota and occupied a site on the northwest slope of Turtle Mountain, 100 kilometres southwest of Brandon, Manitoba.

Beginning in the 1870s, the Canadian government sought to extinguish aboriginal title to the Canadian northwest by entering into numbered treaties with the native people who lived there. The Dakota, classified by the government as "American Indians," did not participate in the treaty process. In 1873, special provisions for the Dakota were passed by Order in Council that set aside reserve land on the basis of 80 acres per family, subject to increase if warranted by population growth. By mid-decade, three reserves had been surveyed in Manitoba for various Dakota bands: Birdtail Creek Indian Reserve (IR 57) and Oak River IR 58 in 1875 and Oak Lake IR 59 in 1877. Hdamani and his followers wished to remain at Turtle Mountain, however, and did not relocate to the newly created reserves. In 1886, the government relented to Hdamani's demands and surveyed a reserve at Turtle Mountain (IR 60), though it was not confirmed by Order in Council until 1913. Officials of the Department of Indian Affairs (the department) felt that the location of the reserve at Turtle Mountain was too near the U.S. border and too far from the supervision of the Indian Agent to make it a stable reserve. Over the next 20 years, the department encouraged Turtle Mountain band members to relocate to other reserves. By 1909, the department had determined that only three families remained at Turtle Mountain, and it persuaded these band members to have a surrender vote. The vote to surrender the entire reserve was put before the five eligible voters identified by the department on August 6, 1909, and resulted in a 3 to 2 count in favour of the surrender.

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[1] The Chief's name has many different spellings, including Aahdamane, the form the Chief himself used. In its original claim submission, the First Nation used the form Hdamani, and in its written submission, the First Nation's counsel used H'damani. We will refer to the Chief as Hdamani throughout this report.

On April 20, 1993, the Oak Lake Sioux First Nation (now known as the Canupawakpa Dakota First Nation), on behalf of the descendants of Turtle Mountain IR 60, maintained that the surrender vote was improperly taken and submitted its claim to Specific Claims West of the Department of Indian Affairs and Northern Development (DIAND). On completing its own research and review, Specific Claims West informed the Oak Lake Sioux First Nation by letter dated January 23, 1995, that Canada had no outstanding lawful obligation under the Specific Claims Policy. On May 11, 2000, the Canupawakpa Dakota First Nation requested the ICC to undertake a review of and hold an inquiry into the 1909 Turtle Mountain IR 60 surrender. On January 10, 2001, the Sioux Valley Dakota First Nation (formerly known as the Oak River First Nation) requested that it be allowed to participate in the ICC inquiry because some of its present-day band members could trace their ancestry back to the former members of the Turtle Mountain Band. During a planning conference on February 15, 2001, the parties (the Canupawakpa Dakota First Nation and Canada) agreed to the Sioux Valley Dakota First Nation's participation as an interested and necessary participant to the inquiry. This agreement was confirmed in a letter to Michelle Pelletier, Research Funding Division, DIAND, on March 2, 2001.[2]

Mandate of the Commission

The mandate of the Indian Claims Commission (the Commission) is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[3] This Policy, outlined in DIAND's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding

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2 Kathleen N. Lickers, Commission Counsel, Indian Claims Commission, to Michelle Pelletier, DIAND, Research Funding Division, March 2, 2001 (ICC file 2106-13-01, vol. 1).

3 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

"lawful obligation" on the part of the federal government.[4] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
>
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[5]

The Commission has been asked to inquire into and report on whether the Canupawakpa Dakota First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendation on the merits of this claim.

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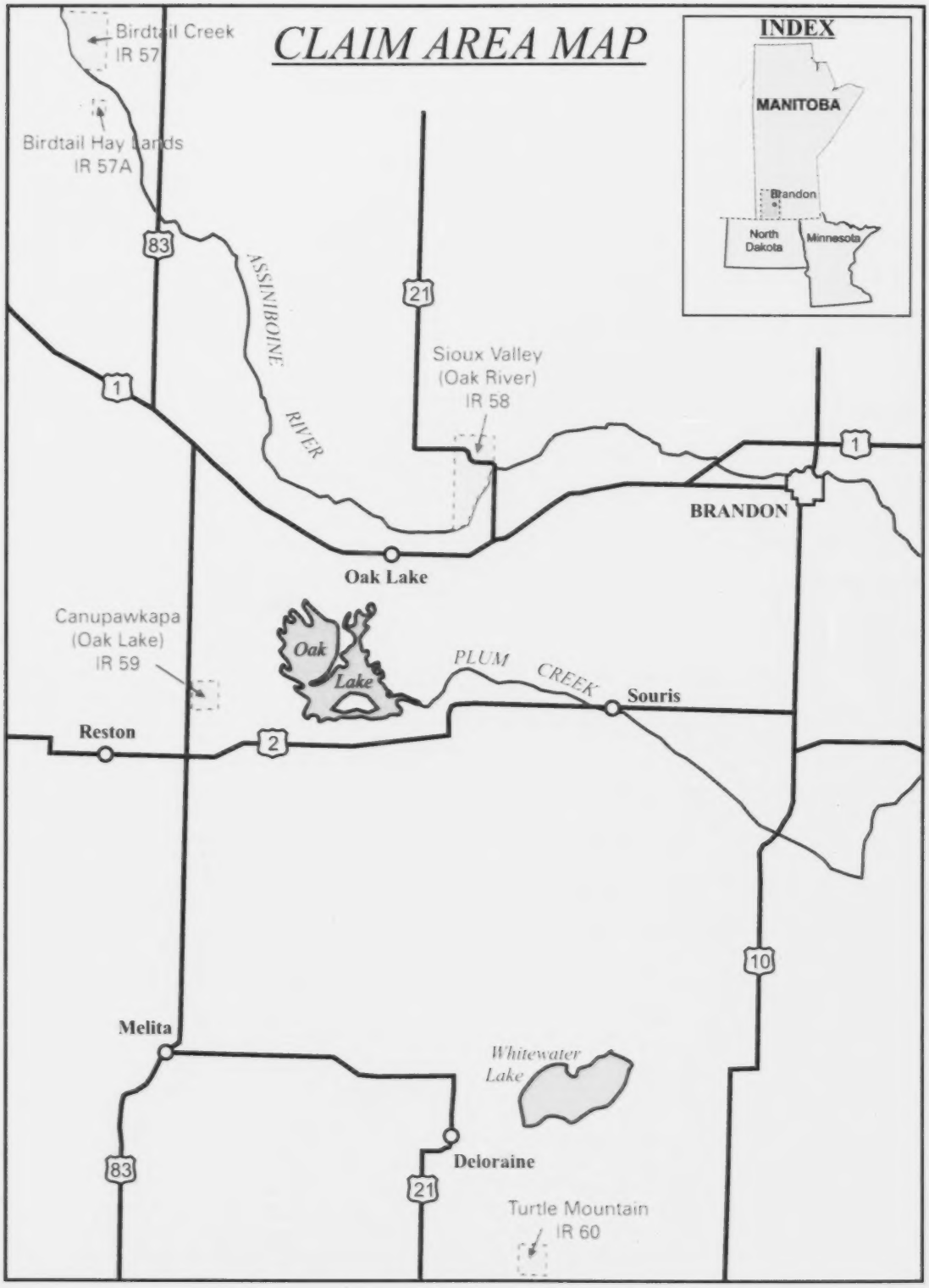
[4] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994), 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

[5] *Outstanding Business*, 20; reprinted in (1994), 1 ICCP 171 at 179–80.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PART II

HISTORICAL BACKGROUND

CREATION OF THE DAKOTA RESERVES IN SOUTHERN MANITOBA

Settlement in the Northwest

During the 1850s and 1860s, the United States was embroiled in violent struggles with the Dakota in the American Midwest. The Dakota had signed a series of treaties with the U.S. government which involved, among other things, land cessions in exchange for residence on reservations. Perceiving that the treaty promises were not fulfilled, some Dakota declared war on the United States in 1862. After a few months' conflict, the American authorities executed 38 Dakota chiefs.[6] During this uprising, small groups of Sisseton and Wahpeton Dakota, some led by Chief Hdamani, fled the United States and made their way to the Turtle Mountain region of what is today southern Manitoba.

Once settled in the Turtle Mountain area, the Dakota asked the Hudson's Bay Company authorities in the Red River settlement at Fort Garry for refuge and protection, and they claimed a right to be on British soil.[7] They spoke of their tribal history, which described how they had collaborated with the British against their enemies. King George III had assured them that, because they had allied with the British in the War of 1812, their culture and freedom would always be respected and honoured wherever British rule prevailed.[8] Shortly after the cessation of hostilities, they said, the Dakota had received medals and flags from the British as a token of this alliance.

The Dakota lived by hunting, fishing, and trapping and engaged in limited agricultural pursuits. In the summer months, they frequented the Hudson's Bay Company post at Fort Ellice to trade their furs and prepare for the fall and winter hunts.[9]

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[6] In fact, relations between the Americans and the Dakota were so volatile that there was an "uprising" in Acton, Minnesota, in September 1862. Many Dakota people fled the Midwest soon thereafter, and for good reason: the Governor had pronounced his intention to "eliminate" every Dakota person in the territory. Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988) (ICC Exhibit 11, p. 20).

[7] Gontran Laviolette, *The Sioux Indians in Canada* (Regina: The Marian Press, 1944), 47–51.

[8] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 17 (ICC Exhibit 11, p. 16).

[9] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 33–34 (ICC Exhibit 11, pp. 32–33); Gontran Laviolette, *The Sioux Indians in Canada* (Winnipeg: DLM Productions, 1991), 159.

By the early 1870s, there was rapid social and political change in Manitoba and the North-West Territories. The Hudson's Bay Company transferred responsibility for government and the administration of laws to the Canadian government, lands were surveyed and opened for settlement, and treaties were negotiated with Canadian Indians on the Prairies.[10]

Dakota Requests for Reserves

By the mid-1870s, nearly two thousand Dakota resided in western Canada. Some 200 lived in five camps near Portage la Prairie. Further west there were 200 people on the Assiniboine River, 500 at Oak Lake, and 155 near Fort Ellice. Hdamani had 125 Dakota with him at Turtle Mountain, and there were about 340 Dakota in the vicinity of Fort Qu'Appelle and 260 on the North Saskatchewan River.[11]

The migration of the Dakota over the previous decade presented a problem for the Canadian government. The government held it was not bound to enter into treaty land negotiations because the Dakota, as "American Indians," had no property rights to extinguish.[12] On February 6, 1872, William Spragge, Deputy Superintendent General of Indian Affairs, wrote to Joseph Howe, Secretary of State for the Provinces, and compared the situation of the Dakota to that of the newly arrived immigrants taking up homesteads in the west. Based on his research of the contemporary documentation, historian Peter Elias has described the situation of the Dakota as follows:

> Spragge reported that six hundred Dakota had claimed consideration from the Crown, saying that their ancestors had been faithful allies, and producing four or five King George III medals as proof. While supporting the idea of a reserve, Spragge dismissed their claim of rights, and wrote that the Dakota, "having no territorial rights appertaining to the territory, it is to the goodwill of the Government towards

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[10] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 34 (ICC Exhibit 11, p. 33).

[11] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 37 (ICC Exhibit 11, p. 35).

[12] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 38 (ICC Exhibit 11, p. 36).

> them that they must look for such appropriations of land as may be set apart for their benefit."[13]

Spragge suggested that, because the Dakota had been supported in the past, the historical relationship should be considered in constructing the current relationship. He also reported that the Dakota were "a well disposed class of Indians" and recommended that a reserve be set aside. Lieutenant Governor Adams George Archibald of Manitoba endorsed this proposal.[14]

On January 4, 1873, on the basis of Spragge's recommendation, Order in Council 761A-1128 was passed. It provided 80 acres for each family but noted that some land was not suitable for farming. As a result, the total land allocated was to be "about 12,000 acres with the understanding that an additional quantity will be reserved should their actual numbers require it."[15] The location of the reserve caused some concern, for officials felt it was both bad policy and inhumane to settle people who had fled from the United States too close to the international boundary. As a result, the Order in Council stated that "the precise locality west of Manitoba should be left open for future arrangements."[16]

At the same time that the Order in Council was passed, the joint (British and American) International Boundary Commission (headed by Captain D.R. Cameron on Britain's behalf) was surveying the 49th parallel. When Cameron reached Manitoba early in 1873, he met with various indigenous groups as the surveyors progressed westward. In February 1873, Aahdamane (Hdamani) wrote to the Commission acknowledging that he had received supplies from it:

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[13] William Spragge, Deputy Superintendent General, to Joseph Howe, Secretary of State for the Provinces, February 6, 1872, as quoted in Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 38 (ICC Exhibit 11, p. 36).

[14] William Spragge, Deputy Superintendent General, to Joseph Howe, Secretary of State for the Provinces, February 6, 1872, as quoted in Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 39 (ICC Exhibit 11, p. 37).

[15] Canada, Order in Council PC 761A-1128, National Archives of Canada (NA), RG 2, series 1, vol. 72 (ICC Documents, Exhibit 1, p. 6).

[16] Canada, Order in Council PC 761A-1128, NA, RG 2, series 1, vol. 72 (ICC Documents, Exhibit 1, p. 7).

> I wish to you to send to me one thing more. I want you to procure me a Spencer Rifle. I should be glad to get one as I am getting slow and old but with one of those can kill Moose and Red Deer yet. I send you this letter and start to gather fur.[17]

By June 1873, the Boundary Commission had established a trading post at Turtle Mountain under the direction of George Hill. Cameron reported that the Dakota residing in the Turtle Mountain area had requested the Boundary Commission to ask the Queen for a reserve at Oak Lake for themselves.[18] In January 1874, Hill forwarded a second request, this one from Hdamani:

> I, Aahdamane a Dahkotah of the Macha Low Band[19] desire to have the Grant of Land from the Queen which is to be given to each of us in the Turtle Mountain, in a part where you think the land is good. I speak for myself and my three sons. We have been in this place for twelve years. I saw the Ojibeway [sic] here and gave him four horses and five sacred pipes. The Chief Warrior of the Ojibeway gave the Turtle Mountain to me and my people. I want some land from the Queen for myself and my three sons and at present know not where they intend to send us.
>
> If you will let what I say be known and tell me what they say I would be very grateful.[20]

Hill also forwarded to Cameron a request by another Dakota resident at Turtle Mountain, Bogaga, for implements and seed.[21] Bogaga's role in the eventual surrender of the reserve forms an important issue in this claim.

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17 Aahdamane (Hdamani) to D.R. Cameron, International Boundary Commission, February 15, 1873, NA, FO 302/3, reel B-5320 (ICC Exhibit 12, p. 21).

18 D.R. Cameron, International Boundary Commission, to unknown recipient, November 29, 1873, NA, FO 302/8, 165 (ICC Exhibit 12, p. 39). It should be noted that Commissioner Cameron said that the Turtle Mountain people conversed freely in English with him *through their spokesperson*.

19 Elias writes in *The Dakota of the Northwest: Lessons for Survival* that Hdamani and his family belonged to the Blue Earth (*ma-k'a'to*) tribe, a part of the Wahpetonwon branch of the Dakota Nation (ICC Exhibit 11, p. 40).

20 Aahdamane (Hdamani) to D.R. Cameron, International Boundary Commission, January 24, 1874, NA, FO 302/8, reel B-5324, 79 (ICC Exhibit 12, p. 50); also RG 10, vol. 3607, file 2988 (ICC Documents, Exhibit 1, pp. 12–13).

21 Bogaga to D.R. Cameron, International Boundary Commission, February 17, 1874, NA, FO 302/3, 106 (ICC Exhibit 12, p. 55).

Hdamani's request for a reserve was acknowledged by the Minister of the Interior in a reply to Cameron:

> The Minister desires me to say that he is gratified to learn from your letter of the friendly feeling evinced to your Surveying party by the Sioux during your operations last year, and that he trusts you will continue to cultivate (as you have hitherto done) friendly relations with all the Indian Tribes with whom your party may come in contact.
>
> I have further to request you to cause Mr. Hill to assure the Indian, Aahdamane, that the Government propose to deal liberally and justly with the Indians in the North West.[22]

In March 1874, Cameron asked Hill to identify and gather information about the Sioux residing at Turtle Mountain.[23] He wanted to ensure that the Sioux understood that the Boundary Commission had no authority to enter into treaties with Indian nations. In his reply, Hill explained that, in the winter of 1873–74, two separate groups of Dakota were living at Turtle Mountain:

> Your letter per Mr. Crompton received some time ago. The Sioux continue asking whether the Government is likely to treat with them in time to plant or not. I am of course unable to answer them thirty six souls in all lived in the Mountain last winter – they occupied seven Tents of these five Tents belonged to the Mocaw Low (Blue earth) Band and two to the Waughpaton Band (Green leaf Band).
>
> Of the former "Ahadamane" is the leader though not a chief or even a warrior, he owes his position to the numerous relatives he has among his band and to his natural shrewdness, although honest enough he is extremely jealous & unctuous, he represents the twenty one Tents of his Band in this country.
>
> Of the other two Tents "Waopeah" is the principal man he is an hereditary Chief & represents upwards of one hundred tents of the Waughpatoan Issate & Biddawocanton Bands in this Country. Most of his people live at the portage.[24]

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22 E.A. Meredith, Minister of the Interior, to D.R. Cameron, International Boundary Commission, February 26, 1874, NA, FO 302/3, reel B-5328, 1005–06 (ICC Exhibit 12, pp. 59–60).

23 Unknown author (probably D.R. Cameron) to George Hill, c. March 1874, NA, FO 302/3, reel B-5320, 564–67 (ICC Exhibit 12, pp. 61–64).

24 George Hill to D.R. Cameron, International Boundary Commission, May 18, 1874, NA, FO 5/1669, reel B-1153, 268 (ICC Exhibit 12, p. 69).

Hill also noted that Turtle Mountain was not occupied permanently, although the Mocha Low Band frequented Turtle Mountain more than any other band and wanted recognition of the fur-rich land for themselves. Although they lived as one people, he wrote that each family desired a separate grant of land. Most important, he noted that they were not a sedentary people.[25] A reserve at Turtle Mountain would enable Hdamani and his followers to pursue their traditional activities of hunting, fishing, and trapping as the basis for their survival in addition to developing a subsistence farming economy.

Order in Council 1104A-1381 was passed on November 12, 1874, authorizing the establishment of two or three reserves for the benefit of the Dakota.[26] The size of the reserves was to be based on an estimate of 80 acres per family of five people. Hdamani wrote to Cameron in December of that year, again asking for a grant of land, oxen, and a plough for his band:

> In the Summer I saw you I wish the Turtle Mountain to be mine and plainly marked out for a Grant.
>
> The Little Saskatchewan is Wahuniste Scahs own (the Wanghpatoan) [Wahpeton]. At Beaver Creek Sisseton also Wanghpatoans have ground. The Mocha Low Band want the Turtle Mountain to plant in. The place is good for fur therefore I am anxious for it. I would like you to tell the Governor to give us this for our Grant with oxen and a plow.[27]

Lieutenant Governor Alexander Morris refused Hdamani's request and insisted that the Turtle Mountain Dakota move to Oak River, where "the Sioux can be induced to combine growing crops, with the pursuit of game, fur-bearing animals and fishing, and eventually, to adopt the habits of civilization."[28] Elias contends that the Turtle Mountain Dakota wanted the Turtle Mountain

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[25] George Hill to D.R. Cameron, International Boundary Commission, May 18, 1874, NA, FO 5/1669, reel B-1153, 268a (ICC Exhibit 12, p. 70).

[26] Canada, Order in Council 1104A-1381, NA, RG 2, series 1, vol. 101 (ICC Documents, Exhibit 1, pp. 21–22).

[27] Aahdamane (Hdamani) to D.R. Cameron, International Boundary Commission, December 21, 1874, NA, FO 230/3, reel B-5320 (ICC Exhibit 12, p. 79).

[28] Alexander Morris, Lieutenant Governor, to David Laird, July 14, 1875, as quoted in Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 50 (ICC Exhibit 11, p. 48).

reserve so they could continue hunting, fishing, and trapping and using the land for winter housing and gardens.[29] Oak River IR 58 was surveyed in the spring of 1875 and, later in the summer, Surveyor William Wagner finished surveying Birdtail Creek IR 57.[30]

In February 1877, Morris wrote to the Minister of the Interior stating that a small band of Dakota (about 20 families wintering there) were living on Turtle Mountain. They wished to be "allowed to settle" on a reserve there.[31] Initially, J. Provencher, the Acting Indian Superintendent, refused to consider any reserve located close to the border, viewing it as both hazardous and expensive.[32] However, after Hdamani visited Morris during the summer, Morris recommended that a reserve be set aside for the Dakota, including the Indians of Turtle Mountain, at Oak Lake.[33] Morris wrote that Oak Lake would be "a suitable place for them and am unaware of the objections to granting them a Reserve there which influence you. They have made the Turtle Mountain their home so long, that it will be difficult to induce them to move far from it."[34]

On November 9, 1877, an Order in Council was passed authorizing a reserve to be set apart for the Dakota at Oak Lake (IR 59), allowing them the same quantity of land (80 acres per family of five) as was assigned at the Oak River and Birdtail Creek reserves.[35]

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[29] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 52 (ICC Exhibit 11, p. 50).

[30] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 49 (ICC Exhibit 11, p. 47).

[31] Alexander Morris, Lieutenant Governor, to Minister of the Interior, February 26, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 23–26).

[32] J. Provencher, Acting Indian Superintendent, to Minister of the Interior, May 4, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 33–36).

[33] Alexander Morris, Lieutenant Governor, to Minister of the Interior, June 16, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 47–48). It should be noted that the Turtle Mountain Dakota, led by Hdamani, brought an interpreter for their discussion with Morris.

[34] Alexander Morris, Lieutenant Governor, to Minister of the Interior, June 16, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 47–48).

[35] Canada, Order in Council 1506A-977, NA, RG 2, series 1, vol. 151, November 9, 1877 (ICC Documents, Exhibit 1, pp. 63–70).

Hdamani and his followers continued to live at Turtle Mountain and were not included with the Dakota bands that received the three reserves (Birdtail Creek IR 57, Oak River IR 58, Oak Lake IR 59). Hdamani's band continued to petition the government for its own reserve at Turtle Mountain,[36] and Indian Affairs personnel also discussed the creation of a Turtle Mountain reserve. In August 1878, however, Acting Indian Superintendent James F. Graham informed the Department of the Interior that no reserve would be laid out at Turtle Mountain that summer.[37]

Establishment of the Reserve at Turtle Mountain

On February 15, 1881, Hdamani wrote to G.F. Newcombe, Dominion Lands Agent in the Turtle Mountain area, complaining that settlers had been cutting timber on lands that the Chief considered belonged to him.[38] In the summer of that year, however, Indian Agent L.W. Herchmer wrote to Assistant Indian Commissioner E.T. Galt and stated that there had been no disturbances and that no trouble was anticipated. He also noted that Ka-dat-money (Hdamani) "thoroughly understands his position, and has been ordered to go to Oak Lake if he wants to farm with good assistance."[39]

The following year, a local settler, James Spiers, wrote to the Land Commissioner of the Canadian Pacific Railway that a group of Dakota had forced him to vacate the area where he had pitched his tent (section 19, township 10, range 24, west of the 1st meridian) because he was encroaching on their lands. "Those Indians belong to a Sioux Reserve about ten miles east," he wrote, "but they claim to own the land along the river west for ten miles."[40] When Herchmer went to Turtle Mountain to investigate the claims of the settlers, he found that the Dakota he encountered

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36 Alexander Morris, Lieutenant Governor, to Minister of the Interior, October 25, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 59–60).

37 James F. Graham, Acting Indian Superintendent, Manitoba Superintendency, to Minister of the Interior, August 8, 1878, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 79–80).

38 Hdamani to G. Newcombe, Dominion Lands Agent, February 15, 1881, NA, RG 10, vol. 3751, file 30004 (ICC Documents, Exhibit 1, p. 82).

39 L.W. Herchmer, Indian Agent, to E.T. Galt, Assistant Commissioner, August 14, 1881, NA, RG 10, vol. 3751, file 30004 (ICC Documents, Exhibit 1, p. 86).

40 James Spiers to J.H. McTavish, CPR Land Commissioner, June 19, 1882, NA, RG 10, vol. 3608, file 3030 (ICC Documents, Exhibit 1, p. 87).

were well thought of by local settlers and that they had established their agricultural economy and community quite successfully. The fault, he determined, lay with the settlers who were taking timber without permit or licence. Moreover, he wrote:

> During the troubles on the American side lately between Indians and Halfbreeds on the one side and Settlers on the other, these Sioux have kept strictly neutral, they receive no assistance from the Government and have purchased their own plows, harrows etc. I have the honor to suggest that during good behavior they may be allowed to occupy Sec. 31, T. 1 R. 22 W., and that I may be permitted to lend them a yoke of government oxen.[41]

On November 24, 1882, A.M. Burgess, Secretary in the Department of the Interior, wrote to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, stating that "these Indians should not be disturbed, so long as they behave themselves in an orderly and law abiding manner."[42] Marginalia on the same document written by an unidentified person stated:

> Mr. McNeill – Inform Mr. Dewdney of this decision & request him to cause the Indians to be informed of the condition on which they will be permitted to remain on the land. Also to authorize Agent Herchmer to lend them a yoke of oxen in the ensuing Spring as suggested by him if they are quite unable to purchase or hire for themselves.[43]

As Hdamani and his followers occupied their land at Turtle Mountain with the blessing of the Department of Indian Affairs, they progressed quickly with their agricultural pursuits, even though no official survey or setting aside of reserve lands had occurred. By 1883, Indian Agent Herchmer wrote, "[T]he small band at Turtle Mountain, under Ka-da-mo-ree, now that they have a

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41 L.W. Herchmer, Indian Agent, to Commissioner of Indian Affairs, September 2, 1882, NA, RG 10, vol. 3608, file 3030 (ICC Documents, Exhibit 1, p. 91).

42 A.M. Burgess, Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, November 24, 1882, NA, RG 10, vol. 3608, file 3030 (ICC Documents, Exhibit 1, p. 92).

43 A.M. Burgess, Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, November 24, 1882, NA, RG 10, vol. 3608, file 3030 (ICC Documents, Exhibit 1, p. 92).

reserve and are getting cattle, will do well."[44] The following year, he noted that the Dakota people were making strides in their development of an agrarian economy and a community, and that the location of the land also enabled them to continue hunting and fishing successfully.[45]

Late in 1885 Indian Commissioner E. Dewdney recommended that the Turtle Mountain reserve be subdivided[46] and, in July 1886, Surveyor A.W. Ponton proceeded to survey a whole section of land, 640 acres, at Turtle Mountain for Hdamani and his followers.[47] Ponton subdivided the reserve into eight equal lots and identified land holdings on the reserve. His survey plan and field book, reproduced on the following page, identified eight different families with nine separate land holdings:

Ta-cah-pi-waśte-śte (Pretty Club) (2 separate parcels of land)
Boǵaǵa
Mazawakan (Shot Gun)
Oye-Duta (Red Track)
Sunkaska (Lone Dog)
Chief Hda-mani (Walking Bell)
Mazadi-oi-win
Winona[48]

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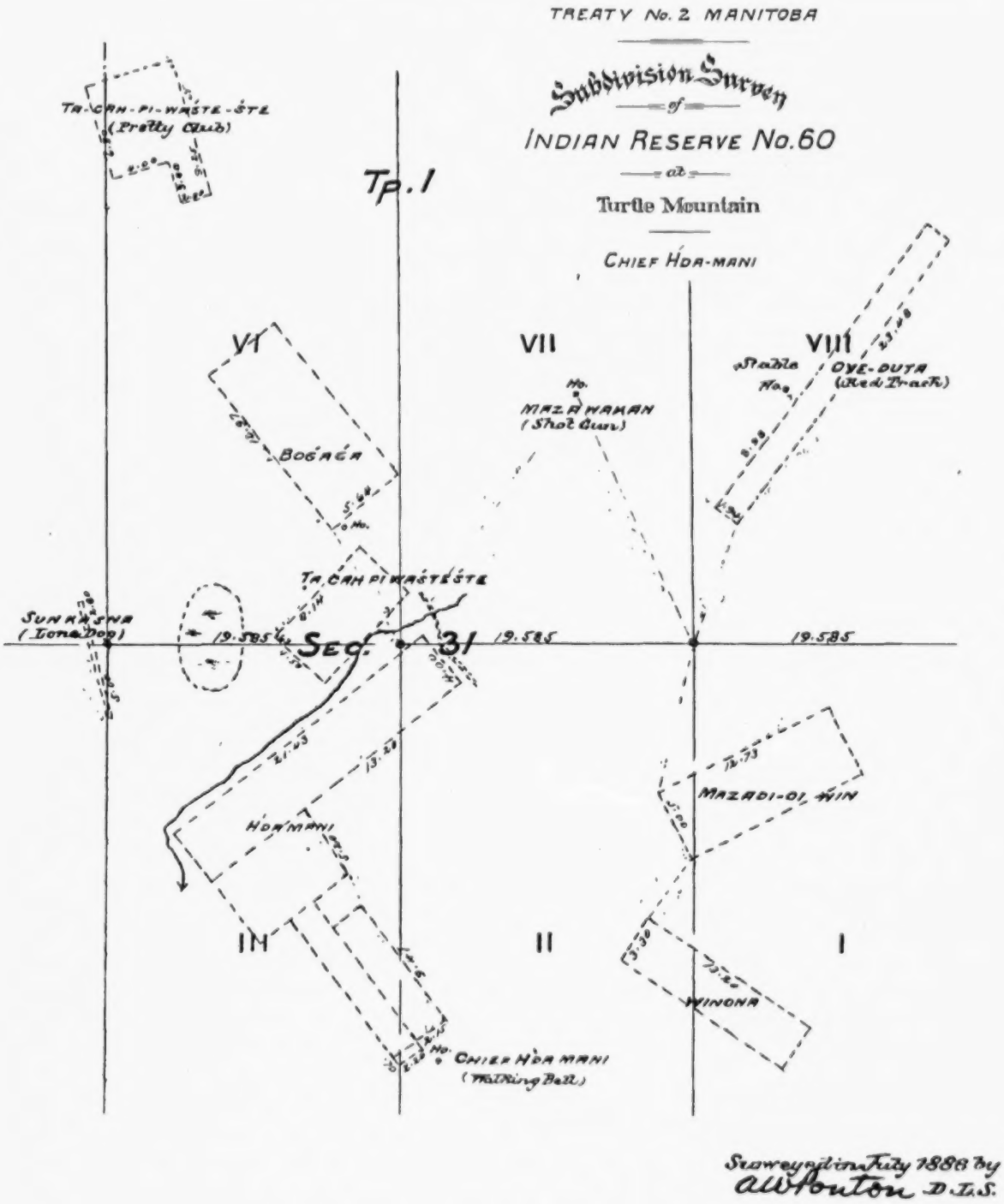
[44] L.W. Herchmer, Indian Agent, to Superintendent General of Indian Affairs, June 30, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883*, 65 (ICC Documents, Exhibit 1, p. 95).

[45] L.W. Herchmer, Indian Agent, to Superintendent General of Indian Affairs, July 26, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, 70 (ICC Documents, Exhibit 1, p. 97). In this correspondence, Herchmer noted that the Turtle Mountain Dakota had broken 35 acres and that they were building "excellent houses."

[46] E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, December 30, 1885, NA, RG 10, vol. 3728, file 25715 (ICC Documents, Exhibit 1, p. 99).

[47] Canada Lands Survey Records (CLSR) Plan T277, *Treaty No. 2 Manitoba Subdivision Survey of Indian Reserve No. 60 at Turtle Mountain – Chief Hdamani*, July 1886, Natural Resources Canada (ICC Exhibit 7).

[48] CLSR Plan T277, *Treaty No. 2 Manitoba Subdivision Survey of Indian Reserve No. 60 at Turtle Mountain – Chief Hdamani*, July 1886, Natural Resources Canada (ICC Exhibit 7), and Field Book 29, *Treaty No. 2 N.W.T., Field Notes No. 60 Turtle Mountain*, July 1886, Natural Resources Canada (ICC Exhibit 8).



Surveyed in July 1886 by
A.W. Ponton D.L.S.

Canada Lands Survey Records (CLSR) Plan T277, *Treaty No. 2 Manitoba Subdivision Survey of Indian Reserve No. 60 at Turtle Mountain – Chief Hdamani*, July 1886, Natural Resources Canada (ICC Exhibit 7).

Ponton submitted his survey report to John C. Nelson, the official in charge of Indian reserve surveys, on December 21, 1886. In it, he found the Turtle Mountain people in possession of section 31, township 1, range 22, west of the 1st meridian.[49]

A letter written in March 1887 by P.B. Douglas, Assistant Secretary of the Department of Indian Affairs, to the Surveyor General indicates that the department intended to constitute the land surveyed by Ponton as an Indian reserve:

> Some correspondence has taken place between the Deputy Superintendent General of Indian Affairs and this Department with reference to Sec. 31, Township 1, Range 22 West of the 1st Meridian, which it is claimed has been in the possession of the Sioux Indians for a number of years and I am now directed to inform you that it has been decided to constitute that Section an Indian Reserve.[50]

The reserve would not be confirmed by Order in Council, however, until November 21, 1913, four years after the surrender.[51]

PRELUDE TO THE SURRENDER

Relocation Strategy Revisited

Three years after the survey of the Turtle Mountain reserve, in August 1889, the Birtle Indian Agent, J.A. Markle, raised the possibility of relocating the Dakota at Turtle Mountain:

> At Turtle Mountain Reserve No. 60, thirty-eight acres were put under crop, but for want of sufficient rain the grain is light. An attempt was made to induce[52] the Indians of this band to remove to some other reserve, where they would be more

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49 A.W. Ponton, Surveyor, Indian Reserve Surveys, to John C. Nelson, In Charge, Indian Reserve Surveys, December 21, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1886*, 181–83 (ICC Documents, Exhibit 1, pp. 111–13). Ponton also found that the Turtle Mountain Dakota people were "industrious," "making progress," and had been on the land for over 20 years.

50 P.B. Douglas, Assistant Secretary, Department of Indian Affairs, to the Surveyor General, March 24, 1887, NA, RG 88, vol. 299, file 0500-2 (ICC Documents, Exhibit 1, p. 114).

51 Canada, Order in Council PC 2876, NA, RG 2, series 1, vol. 1276 (ICC Documents, Exhibit 1, pp. 546–49).

52 The Oxford English Dictionary defines "induce" as "to persuade or to prevail upon." This definition was recorded in 1998 and is likely close in meaning to the term as it was used in the years 1872–1909.

> under the direct supervision of an official of the Department, as it has been found that the reserve is too near the boundary line, but as yet I have not been able to get them to assent to the request of the Commissioner in this particular.[53]

Markle cited the close proximity of the reserve to the international border and the 100-mile distance from supervision by the Indian Agency office at Birtle as significant reasons for the Dakota not having progressed with agricultural pursuits as he had hoped.[54] The Assistant Indian Commissioner advised him to continue his efforts to convince the Band to relocate:

> Dept. will remember that some 2 years ago it approved the idea of getting the Indians removed if possible to White Bear's Reserve Moose Mtn. where they would be looked after properly. Until now the Agt. has reported himself unable to make any impression on them, but was told to persevere as it was felt that through time, they would be got to view the idea more favourably.[55]

By 1891, the limited role of the Indian Agent at Turtle Mountain and the Agent's perceived rationale for this situation had become evident even to local settlers. In April of that year, settler Edward Kerr wrote a letter to Thomas Daly, Minister of the Interior, concerning the nature of the department's interaction with the Dakota of Turtle Mountain. He reported that the Indian Agent was not providing necessary goods or services for the Dakota people. Specifically, he noted, they required seed, implements, and a farming instructor.[56]

Kerr's letter was forwarded to Hayter Reed, the Indian Commissioner at the time. Reed responded to Daly that the "Indians referred to are, as you supposed, refugee Sioux, and consequently

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[53] J.A. Markle, Indian Agent, to Superintendent General, August 6, 1889, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1889*, 58 (ICC Documents, Exhibit 1, p. 117).

[54] J.A. Markle, Indian Agent, to Indian Commissioner, July 2, 1890, NA, RG 10, vol. 3783, file 40470 (ICC Documents, Exhibit 1, p. 136).

[55] Marginalia notation of A.E. Forget, Assistant Indian Commissioner, in J.A. Markle, Indian Agent, to Indian Commissioner, July 2, 1890, NA, RG 10, vol. 3783, file 40470 (ICC Documents, Exhibit 1, p. 136).

[56] Edward Kerr to Thomas Daly, Minister of the Interior, April 12, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, pp. 137–38). Kerr also wrote, significantly, that the Turtle Mountain Dakota "talk good English."

anything done for them is a matter of grace and not of right."[57] Reed, concerned about the provision of an Indian Agent to a location far from other agencies, focused his attention on the removal of the Turtle Mountain people to Moose Mountain. Although there is no record of any response from the Department of Indian Affairs to Kerr, Reed followed up his letter of April 21 with another the following day to Indian Agent Markle. Reed instructed Markle to provide seed potatoes to the Band, but to continue his efforts to get the people to relocate to Moose Mountain.[58] Rather than providing seed potatoes as a gift to the Band, however, Markle instructed A.R. Renton, who lived close to the reserve, to sell Hdamani's ox and to purchase 30 bushels of seed potatoes for the Band from the proceeds of that sale.[59]

A report written by T.P. Wadsworth, Inspector of Indian Agencies, on September 7, 1891, reveals that the Oak Lake and Turtle Mountain reserves did not receive any food supplies between September 1890 and September 1891.[60] Wadsworth also reported that the population "of the small band of Sioux" at Turtle Mountain for that year numbered 30[61] and that Markle was to be congratulated for keeping in touch with all the Indians in his agency.[62]

In April 1893, Chief Hdamani wrote to the department complaining of unfulfilled promises that had been made when the Dakota initially settled at Turtle Mountain:

> This Chief and a good interpreter [illegible] me to remind the Agent of this District of promises made to them when they settled on the Reserve farming outfit Binder

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57 Hayter Reed, Indian Commissioner, to Thomas Daly, Minister of the Interior, April 21, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 139).

58 Hayter Reed, Indian Commissioner, to J.A. Markle, Indian Agent, April 22, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 141).

59 J.A. Markle, Indian Agent, to Hayter Reed, Indian Commissioner, April 25, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 143).

60 T.P. Wadsworth, Inspector of Indian Agencies, to Hayter Reed, Indian Commissioner, September 7, 1891, NA, RG 10, vol. 3859, file 82250-2 (ICC Documents, Exhibit 1, p. 158).

61 T.P. Wadsworth, Inspector of Indian Agencies, to Hayter Reed, Indian Commissioner, September 7, 1891, NA, RG 10, vol. 3859, file 82250-2 (ICC Documents, Exhibit 1, p. 178).

62 T.P. Wadsworth, Inspector of Indian Agencies, to Hayter Reed, Indian Commissioner, September 7, 1891, NA, RG 10, vol. 3859, file 82250-2 (ICC Documents, Exhibit 1, p. 189).

> [illegible] farming mill ploughs harrows oxen wagon etc. school and library and church etc. than give reason why they are not allowed to sell their cattle where they like without going to jail. They can get nothing from the Agent Arckir [Markle] is no good. He takes more than he gives and lies besides. Give this memo due consideration & oblige the Chief.[63]

The Indian Commissioner's response to Hdamani's complaint conformed with the department's desire to relocate the Band. The Commissioner advised Chief Hdamani that he was mistaken with respect to his requests and that he would not receive them. He was, again, advised to relocate to the Moose Mountain Agency:

> You are evidently in error as to what promises were made to you by the Agent when you settled on your present Reserve, for those you allege to have been made include things which are not given to Indians ever although they are well behaved and belong to our own Treaties. I very much regret that reports which have been reaching me are not such as to lead one to suppose that anything would be gained by giving you and your band any additional assistance. You knew that in order to have you assisted to farm and so make your own living, I was anxious to have you remove to the Moose Mountain Agency where you could be well looked after, and I hope that you will yet see that it is for the benefit of you all to fall in with that wish of mine, or if you would prefer it you could be settled among the Sioux on the Bird Tail Reserve.
>
> I have always been hoping that you would see the desirability of falling in with our desires [to relocate you to another reserve] in your own interests, and have been very loath to compel you to do so, but I do not see how it will be possible to leave you any choice in the matter, unless you and your people entirely discontinue the purchase and use of intoxicants.[64]

The failure to provide agricultural help to the group at Turtle Mountain was one factor, in addition to others, that contributed to stagnant agricultural returns for the Dakota. Indian Agent Markle's annual reports to the department indicate that, in 1894, the Dakota had 15 acres of land

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[63] Hdamani to unidentified recipient, c. April 1893, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 195). Agent Markle had been accused before of "fooling" the Dakota. Chief Two Dogs of Deloraine wrote to the Indian Agent of the Moose Mountain Agency to complain that promises made to him and his followers about land had not been kept. Two Dogs to J.J. Campbell, August 25, 1892, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, pp. 191–92).

[64] Hayter Reed, Indian Commissioner, to Chief Hdamani, May 30, 1893, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, pp. 198–99).

under cultivation;[65] in 1895, 16 acres;[66] and in 1896, 7 acres.[67] Markle attributed the lack of progress in agricultural pursuits among the Dakota to the reserve's close proximity to the U.S. border and the influence of "scallawag Indians from both sides of the line."[68]

Band Member Relocation of 1898

According to the *Indian Act* of 1895, the transfer of an Indian from one band to another had to conform with the following procedures:

> 8. The Indian Act is hereby amended by adding the following sections thereto:
>
> 140. When by a majority vote of a band, or the council of a band, and his admission thereinto is assented to by the superintendent general, such Indian shall cease to have any interest in the lands or moneys of the band of which he was formally a member, and shall be entitled to share in the lands and moneys of the band to which he is so admitted; but the superintendent general may cause to be deducted from the capital of the band of which such Indian was formerly a member his per capita share of such capital and place the same to the credit of the capital of the band into membership in which he had been admitted in the manner aforesaid.[69]

The particular circumstances of the 1898 relocation from Turtle Mountain case are listed here for purposes of clarity, as the facts surrounding the relocation are detailed and often convoluted:

- On March 8, 1898, Indian Agent Markle wrote to the Indian Commissioner that two families living on Turtle Mountain (likely Iyo-jan-jan and Widow Kasto) had agreed to move to the Oak Lake reserve if the Department of Indian Affairs would erect dwellings for them in their

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[65] J.A. Markle, Indian Agent, to Superintendent General of Indian Affairs, July 17, 1894, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1894*, 59 (ICC Documents, Exhibit 1, p. 201).

[66] J.A. Markle, Indian Agent, to Superintendent General of Indian Affairs, August 5, 1895, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1895*, 143 (ICC Documents, Exhibit 1, p. 207).

[67] J.A. Markle, Indian Agent, to Superintendent General of Indian Affairs, July 30, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896*, 145 (ICC Documents, Exhibit 1, p. 219).

[68] J.A. Markle, Indian Agent, to Superintendent General of Indian Affairs, July 30, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 145 (ICC Documents, Exhibit 1, p. 219).

[69] *Indian Act*, SC 1895, c. 35, s. 8(140).

new location. Markle also mentioned that during the attempts to relocate the Band to Moose Mountain, a similar "inducement" was authorized by the department.[70]

- On March 22, 1898, J.D. McLean, Secretary of the Department of Indian Affairs, approved the relocation in a letter written to A.E. Forget, Indian Commissioner, stating that the two families would receive $40 each towards the construction of new homes, but that this payment was not to be viewed as a commitment to similar expenditures in the future. He also cautioned that "[c]are should be taken to get formal consent of the Band to which it is proposed to transfer any of these Indians, and also to get a written renunciation of the Indians removed to all title, claim or interest on the Reserve at Turtle Mountain."[71]

- On March 28, 1898, Indian Commissioner Forget approved the payment of $80 and instructed Indian Agent Markle to facilitate the transfer according to the wishes of the department. Markle was specifically instructed to obtain both the consent of the Oak Lake Band for the admission of the Turtle Mountain families and a written renunciation of "all claim, title or interest to or in the Reserve at Turtle Mountain" from those families.[72] Some 12 years later Markle admitted that the formal consent of the Oak Lake Band and the renunciation of the rights to Turtle Mountain by the relocated families were never carried out.[73]

- On May 24, 1898, Markle reported that three families (Iyo-jan-jan, Widow Kasto, and Kibana Hota) had moved from Turtle Mountain to the Oak Lake reserve. He included an additional request from Kibana Hota for a sum of $40 to help in constructing his new home. Widow Kasto also requested the reservation of two small parcels of land at the Turtle Mountain IR 60 site for a burial plot.[74]

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[70] J.A. Markle, Indian Agent, to Indian Commissioner, March 8, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 233–34).

[71] J.D. McLean, Secretary, to A.E. Forget, Indian Commissioner, March 22, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 237).

[72] A.E. Forget, Indian Commissioner, to Indian Agent, Birtle Agency, March 28, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 238).

[73] J.A. Markle, Inspector of Indian Agencies, to J.D. McLean, Secretary, August 29, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 421–22).

[74] J.A. Markle, Indian Agent, to A.E. Forget, Indian Commissioner, May 24, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 243–44).

> Although the department approved the financial consideration for the Iyo-jan-jan and Kasto families in 1898,[75] it refused to allocate $40 for Kibana Hota.[76]

- On June 8, 1898, the Secretary to the Indian Commissioner's office advised Markle that "the wishes of the Indians with regard to the burial plots referred to will, of course, be respected should the reserve be sold."[77]

A second request was made in 1902 by the new Indian Agent, G.H. Wheatley, on behalf of Kibana Hota for remuneration of his expenses to build a new house,[78] but it was not until 1913 that Hota received any consideration from the department.[79]

The relocation of these three families to Oak Lake provided an opportunity for the department to look into the question of surrendering the Turtle Mountain reserve. A letter written by James Campbell, an Indian Affairs official, to the Secretary reiterated the importance of obtaining the consent of the Oak Lake Band for the receipt of Turtle Mountain members. He noted that the area was a rendezvous for American Dakota and that the population of Turtle Mountain, "some 29 souls," did not justify the cost associated with such long trips from the Indian Agency. As well, the issue of the nature of the surrender and the procedure to facilitate it remained at the forefront of the discussion:

> The Commissioner was instructed, however, to be careful to get formal consent of the Band to which it is proposed to transfer them, to receiving them and written renunciation of Indians removing to all title, claim or interest in the Reserve at Turtle Mountain.

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75 J.D. McLean, Secretary, to A.E. Forget, Indian Commissioner, March 22, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 237).

76 J.D. McLean, Secretary, to J.A. Markle, Indian Agent, September 13, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 262).

77 Secretary to the Indian Commissioner to Indian Agent, Birtle Agency, June 8, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 247).

78 G.H. Wheatley, Indian Agent, to Secretary, Department of Indian Affairs, March 25, 1902, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 270).

79 J.D. McLean, Secretary, to James McDonald, February 8, 1913, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 520–21).

> This is how the matter now stands, but probably before any disposition of the Reserve could be made, that is in the event of all agreeing to remove, a surrender would have to be taken before it could be disposed of, and then the question would have to be considered as to whether it should not be sold for the benefit of the owners, and whether the Band receiving them should not share in such benefit, as a return for adopting them.[80]

Indian Agent Markle suggested that the eastern half of the Turtle Mountain reserve, the area where the three families had previously resided, be disposed of as soon as possible[81] because Chief Hdamani was trying to induce "vagrant American Sioux" to locate on those lands.[82] Markle's suggestion was turned down by the Indian Commissioner's Office, however, since "[t]he ultimate disposal of the reserve can hardly be considered while a portion of the membership of the band continue to reside on it."[83] As well, in June 1898 Markle wrote to the Secretary of Indian Affairs that "there is little ground to hope that they [the Turtle Mountain members] will agree to remove and surrender their claim."[84] Also in that year, the department reminded Markle of the legislative requirements for surrendering Indian reserves.[85]

In 1902, Markle was replaced by Indian Agent G.H. Wheatley, who served at the Birtle Agency until 1906. Although little information remains about the Dakota at Turtle Mountain during Wheatley's tenure, there are reports of American Dakota citizens crossing into Canada and of

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[80] James Campbell to the Secretary, May 20, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 239–40).

[81] J.A. Markle, Indian Agent, to Indian Commissioner, May 24, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 242–44).

[82] J.A. Markle, Indian Agent, to Secretary, Department of Indian Affairs, June 10, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 249).

[83] Secretary to the Indian Commissioner to Indian Agent, Birtle Agency, June 8, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 247).

[84] J.A. Markle, Indian Agent, to Secretary, Department of Indian Affairs, June 10, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 249).

[85] J.D. McLean, Secretary, to J.A. Markle, Indian Agent, June 23, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 251).

Canadian Dakota Indians crossing into the United States.[86] In fact, Wheatley submitted the same word-for-word description of the Turtle Mountain reserve for the annual reports of the Department of Indian Affairs in each year of his tenure.

Band Member Relocation of 1908

In 1907, the administration of the Dakota reserves in southern Manitoba was transferred from the Birtle Agency to the Griswold Indian Agency, which was under the direction of a newly appointed Acting Indian Agent, J. Hollies. In his 1907 annual report, Hollies wrote that he visited the Turtle Mountain reserve to investigate charges made by Chief Hdamani that American Indians were visiting the reserve and participating in gambling, drinking, and carousing.[87] Hollies, assisted by the Deloraine Chief of Police, Charles Stevens, identified the resident Indians and found the reserve to be as "quiet as a church." Hollies suggested that Stevens be used as a watchdog, with the authority to expel any trespassers who visited the reserve.[88]

In January 1908, Hollies, acting on instructions from the Department of Indian Affairs and from Indian Commissioner David Laird, visited Turtle Mountain IR 60 to conduct a census of the Indian residents. Through his interpreter, Hollies determined that 13 families, with a population of 45, were resident on the reserve. He also stated that quarrels were frequent, discord he attributed to Chief Hdamani's demand that he receive the best land. In that same report, Hollies addressed the expense and impracticality of maintaining a reserve at Turtle Mountain. He recommended that four male members of three families be given the right to vote on the surrender of the reserve, even though examination of the census list he compiled reveals that 15 men aged 21 years or older were

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[86] David Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, June 21, 1902, NA, RG 10, vol. 3797, file 47554-2 (ICC Documents, Exhibit 1, p. 271).

[87] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, August 1907, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 288–89).

[88] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, 28 August 1907, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 286).

residing at Turtle Mountain.[89] Subsequent correspondence discloses that an additional male band member, Mahtohkita, was away at the time Hollies completed his census.[90] In the same letter, Hollies wrote as follows:

> #1 Hdamani and Wife, with #2 Bogaga and wife, are too old and feeble to work for a living any more and should I think be provided for as "Old and Destitute"[91] as they belong to this Agency, they could be placed without having lands, on Oak River reserve under the Agent's care.
>
> #3 Sunkanapi is the only remaining voter, that has a say in the "surrender" of the lands of the Reserve. A careful presentation of the advantages he would reap on a large reserve compared with the confined and cramped position he now occupies, would I think make him willing to request to be transferred to such reserve, more especially if assistance and direction were given to establish him there.[92]

Hollies also determined that "the others have no vote on the 'surrender' but in my opinion should have a share in the funds realized from the sale, applied as the Dept. or yourself may see fit, to establish them in their new home."[93] Adjacent to the previous quotation, the Assistant Commissioner wrote in a marginalia note: "[T]he reasons for this would have to be stated and carefully considered."[94]

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89 Two separate and different lists, both written in the same handwriting, have been entered into the document collection. J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2, and NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 298–99).

90 J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, September 21, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 330).

91 An earlier version of the *Indian Act* included payment to Indian people considered unable to provide for themselves. In 1886, "Aged and Destitute" Indians were part of a discretionary group that the Superintendent General of Indian Affairs could furnish with sufficient aid. *Indian Act* (1886), 43 Vic., c. 28, ss. 1, 74.

92 J. Hollies, Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 296).

93 J. Hollies, Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 296).

94 J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 296).

The method Hollies used to determine eligible voters was questioned by J.D. McLean, Secretary of the Department of Indian Affairs, on February 21, 1908.[95] In his reply to the department, Hollies stated:

> I beg to state that the copy of the "Census Book" of the Turtle Mountain Reserve at this Agency the original of which is in the office of the Indian Commissioner at Winnipeg, shows only nine people on the reserve in three families. The heads of the families being the first three on the list, in my report for January. All previous reports yearly, or otherwise, show only the same number with the same heads. The remainder on the list, straggled on to the reserve, and have ever been treated by former Agents as stragglers, and ordered away.
>
> However, no action was ever taken to carry the orders into effect, and the stragglers in time became residents, having remained on the reserve, year after year, some for fifteen years.
>
> They never applied for admission to the band. The method of application and gaining admission into the band, as I take it, seems to have been unknown to them, for it was never followed, neither is there any authority to place their names on the band list, for of course, not being reported, nothing was known of them by the Department! They have been severely let alone!
>
> My conclusions were based upon the reasonableness of not giving a vote to Indians who had hitherto, never been received formally into membership of the band, and appeared legally, not entitled to any say, as to surrender of the lands.
>
> But at the same time in equity having become residents, for they now have houses, stables, hay, and some lands they call their own, which some cultivate – It is their home! It is certainly no fault of theirs they are there; It seems to me they should have some share, perhaps not a pro rata share, but a share sufficient to give them a start on a larger reserve and among their own people.
>
> As to the value of the lands on said Turtle Mountain reserve, I would say about $18.00 per acre. I am of the opinion that if placed upon the market and sold by auction, they would realize that amount.[96]

Hollies' plan of differentiating between those residents who had the right to vote on the question of a surrender and those who were simply a resident on the reserve was approved in a memorandum written by W.A. Orr, In Charge Lands & Timber Branch, to the Deputy Minister. Orr

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[95] J.D. McLean, Secretary, to J. Hollies, Acting Indian Agent, February 21, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 300).

[96] J. Hollies, Acting Indian Agent, to J.D. McLean, Secretary, March 7, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 301-2).

stated that those members who were simply residents of the reserve and not entitled to vote would receive compensation only for their improvements.[97]

The international boundary and the seasonal relocation and casual absences of Turtle Mountain reserve members were all subjects of concern for Agent Hollies. In his July 1908 report, he noted that four families from Turtle Mountain had gone "across the line" when he visited the reserve in June. Hollies also mentioned that when Bogaga, whom he described as "very old," returned from Fort Totten, Hollies would endeavour to persuade him to relocate to the Oak River reserve.[98]

In August 1908, Hollies again visited the Turtle Mountain reserve, where he found that four families, had applied for and been accepted into the Oak Lake Band:

> I have the Honour to state that I have visited The Turtle Mountain Indian Reserve #60, once the latter part of June, and again on the first of August. On the last occasion, #5 on the list forwarded to Department with January Report of Turtle Mountain Indian Reserve #60, Hinhansunna, filled in an Application for admission into Oak Lake Band #59, so did #6, George Nayioza, also Sam Eagle #10, likewise, John Matoita #12. The Applications were dated August 3rd 1908. These I presented To Oak Lake Band #59 on the 8th of August. The Band accepted and granted the petition of each one. The forms of petition and Acceptance I am forwarding in the usual way to the Indian Commissioner at Winnipeg. I might add that Oak Lake Band, prior to my visit was fully aware of what had taken place on the Turtle Mountain Reserve, and knew the purport of my visit on this occasion to Oak Lake Band #59.[99]

Hollies also noted that his interpreter, William Kasto, witnessed the signatures of each petitioner. Notably, in a communication from Deputy Superintendent Frank Pedley to Hollies, Pedley advised Hollies of the requirement that any surrender should be effected according to the provisions of the *Indian Act* (assent, then execution by two of the principal men before a stipendiary magistrate

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[97] W.A. Orr, In Charge Lands & Timber Branch, to Deputy Minister, March 20, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 303).

[98] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 314, 315).

[99] J. Hollies, Acting Indian Agent, to Secretary, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 319).

or a justice of the peace).[100] A fifth male member, Mahtohkita, of Turtle Mountain petitioned on September 16, 1908, to become a member of Oak Lake.[101] Of the nine members who signed Mahtohkita's acceptance form, three signatories were those who had moved from Turtle Mountain the previous month. As well, the August 1908 forms included the request from the Turtle Mountain residents to move to Oak Lake along with the Oak Lake acceptance, while the September 1908 form included only the acceptance. Hollies reported that only two Oak Lake band members voted against the acceptance of Mahtohkita.[102]

This information is contradicted by John Hunter, the same Oak Lake band member who accompanied Hollies and acted as an interpreter during the census taking the previous January. On September 21, 1908, Hunter wrote to the Indian Commissioner in Winnipeg stating that half of the Oak Lake membership did not want Mahtohkita's application to be accepted.[103] According to the *Indian Act* of 1906, the transfer of an Indian from one band to another had to follow these procedures:

> 17. When, by a majority vote of a band, or the council of a band, an Indian of one band is admitted into membership in another band, and his admission thereinto is assented to by the Superintendent General, such Indian shall cease to have any interest in the lands or moneys of the band of which he was formerly a member, and shall be entitled to share in lands and moneys of the band to which he is so admitted.[104]

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100 F. Pedley, Deputy Superintendent General, to J. Hollies, Acting Indian Agent, September 3, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 328).

101 J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, September 16, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 329).

102 J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, September 21, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 330).

103 John Hunter to the Indian Commissioner, September 21, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 331).

104 *Indian Act*, SC 1906, c. 81, s. 17(1).

Hollies noted that one member of the remaining Turtle Mountain families was in the United States and that two others could be treated as though they had left the reserve. Chief Hdamani and Bogaga, he noted, would not consent to live at Oak River IR 58.[105]

In October 1908, Hollies again visited the Turtle Mountain reserve and found that two members, Tetunkanopa and Sunkanapi (identified on the January 1908 census list), had returned to the reserve. Hollies also provided Chief Hdamani and Bogaga with food rations and blankets.[106]

Surrender of the Turtle Mountain Reserve, 1909

The relocation of some Turtle Mountain residents to Oak Lake appeared to rekindle efforts by government officials to persuade the remaining residents of Turtle Mountain to surrender their reserve. In fact, Hollies wrote in January 1908 of the necessity for surrender, saying:

> The present immoral menace of the reserve of one square mile, made so by its unique position, would justify even drastic measures to end it, but the above are mild, turn no sharp corners, and seem practicable.
>
> The funds, from the sale of 640 acres, unhampered, would go far to readjust the Indians, in a better home with hopeful prospects; and would enable that menacing reserve to be blotted out.[107]

After learning of the transfers, Frank Pedley, Deputy Superintendent General of Indian Affairs, gave permission to Indian Agent Hollies to obtain a surrender of the Turtle Mountain reserve and provided him with the directions and the necessary forms to do so.[108] In reply to Ottawa, Hollies thought that

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105 J. Hollies, Acting Indian Agent, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 320).

106 J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, November 2, 1908, NA, RG 10, vol 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 337).

107 J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 296–97).

108 F. Pedley, Deputy Superintendent General, to J. Hollies, Acting Indian Agent, September 3, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, p. 328).

the timing of the proposed surrender vote was not favourable and suggested that it be delayed until the "inclination of the Turtle Mountain Sioux" was more promising.[109]

Hollies' efforts to obtain a surrender did not go unnoticed. S. Swinford, the Inspector of Indian Agencies, wrote to Indian Commissioner Laird that Hollies had succeeded in getting several families to move from the Turtle Mountain reserve. He also wrote of the three remaining families at Turtle Mountain whom Hollies hoped to induce to relocate to other locales.[110]

In 1909, Hollies seemingly found a more amenable membership when he discussed surrender of the Turtle Mountain reserve. On March 11, 1909, he again visited the reserve and found that two members, Bogaga and Tetunkanopa, had "declared their desire to Surrender the reserve lands; whilst the third, Hdamani #1, wishes to hear direct from you."[111] Hdamani requested that the information come from Indian Commissioner Laird, Hollies reported, because Hdamani took the position that the land had been given to him alone and that he secured it personally. In his report, Hollies noted that all three of the members were over the age of 65, incapable of farming 640 acres, and were on a ration list.[112] Hdamani's request for a meeting was answered by Laird, who wrote directly to the Chief:

> As you are all getting old, and are incapable of farming any of the land in that reserve, I would strongly advise you to remove to another Sioux Indian Reserve and surrender the Turtle Mountain Reserve for sale.
>
> Mr. Hollies states that it is your intention to come to Winnipeg to interview me on the subject, and I wish to advise you that as I am shortly to remove to Ottawa it would be useless for you to come.

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[109] J. Hollies, Acting Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, November 20, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 339).

[110] S. Swinford, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 12, 1908, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 353).

[111] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, March 15, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 359).

[112] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, March 15, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 359).

> Whenever you have decided to surrender the reserve, you may advise Mr. Hollies who will report the fact to the Department, and an official will doubtless be deputed to take the necessary surrender, which I would again advise you to sign.[113]

It is interesting to note that Laird's reply to Hdamani was returned to Laird by Hollies, who advised that the last paragraph should be changed because Hollies himself had been appointed to take the surrender.

Subsequent correspondence by Hollies indicates that Laird wrote another letter to Hdamani. According to Hollies' account, once the Indian Commissioner had written to Chief Hdamani to advise him to surrender the reserve, Hdamani wrote to Hollies asking him to come to the reserve. When he arrived with his interpreter, Hollies found Tetunkanopa absent but Hdamani and Bogaga present. Chief Hdamani asserted that neither Bogaga nor Tetunkanopa had rights to the Turtle Mountain reserve. As Tetunkanopa was away, Agent Hollies halted the proceedings, noting that the surrender papers should be redelivered with the word "Chief" struck out. He also noted that Bogaga, now blind, was living at Oak River, where Hollies could take care of him.[114]

In June 1909, Hollies reported that Tetunkanopa had returned to Turtle Mountain and "awaits the pleasure of the Department in the matter of 'Surrender.'"[115] Hollies referred to his letter of April 28, 1909, and again requested the modification of the surrender papers. He stated:

> You will observe that since the "Chief" Hdamani is obdurate, and will not do as he promised The Commissioner re surrender, but claims the reserve as all his own, the present "Surrender" papers are not applicable, – hence I return the same to be modified, and made applicable to the present date and conditions.[116]

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[113] David Laird, Indian Commissioner, to Chief Hdamani, Turtle Mountain Sioux Reserve, March 17, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 361).

[114] J. Hollies, Acting Indian Agent, to Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 367–69).

[115] J. Hollies, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, June 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 372).

[116] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, June 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 372).

On June 9, Hollies requested authority to travel to the Turtle Mountain reserve to obtain a "Surrender of that Reserve."[117] One week later he received permission to do so. In a letter dated June 16, 1909, Pedley forwarded the amended forms of surrender and instructed Hollies to make a "special visit to the reserve in regard to the surrender."[118]

On August 5, 1909, Hollies visited Turtle Mountain IR 60 and informed the members that a meeting of the Band would be held the next day to consider the surrender of the reserve.[119] On August 6, 1909, Hollies, with an interpreter, met with the Band at Chief Hdamani's house to discuss the surrender. Three people (Bogaga, Tetunkanopa, and his son Charlie Tetunkanopa) voted in favour of the surrender of the Turtle Mountain reserve. Two people (Hdamani and his grandson Chaske)[120] voted against surrender.[121] Agent Hollies also noted that all three who voted in favour travelled with him to Deloraine in order to find a qualified person to take the affidavit. On August 9, the surrender papers were signed in the presence of Deloraine Chief of Police Charles E. Stevens, and the affidavit was executed by Tetunkanopa and Hollies in the presence of Justice of the Peace T.K. Spence.[122] Hollies also noted that he valued the land at $18 an acre and that those who voted in favour of surrender did so because Chief Hdamani insisted that the land was his alone. A statement showing values and improvements on the reserve was attached to this report.[123]

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117 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, June 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 373).

118 F. Pedley, Deputy Superintendent General, to J. Hollies, Indian Agent, June 16, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 374).

119 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 382).

120 Also referred to as Charlie Eagle in later communications.

121 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 382).

122 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–83).

123 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 384).

The surrender document was signed by the three men who had voted for the surrender – Bogaga, Tetunkanopa, and Charlie Tetunkanopa. Terms of the surrender were as follows:

> ... all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, and sufficient of the proceeds of the sale to give the Indians a start in their new homes, and also sufficient to compensate the owners of improvements situate on the land hereby surrendered, be placed to our credit and interest thereon paid to us in the usual way ...[124]

Order in Council PC 1788 was passed on August 28, 1909, accepting the surrender of Turtle Mountain IR 60.[125] Although the surrender of the reserve was confirmed in 1909, its actual creation occurred four years later, by virtue of Order in Council PC 2876 on November 21, 1913, when the Turtle Mountain reserve was withdrawn from the operation of the *Dominion Lands Act*.[126]

On September 2, 1909, John Hughes, a resident of Deloraine, wrote to the Minister of the Interior on behalf of Chief Hdamani and stated that the Chief had not received anything after Bogaga and Tetunkanopa moved away. Further, Hughes complained that those two Turtle Mountain members had received sums of money and Hdamani had not, and that the Chief considered this treatment an injustice.[127]

Although the reserve was surrendered in 1909, some members of the Band continued to occupy it. In his annual report for the Griswold Agency for the fiscal year ending March 1910, Hollies stated that "the total number remaining on this reservation is 9, 6 having migrated south of the line during the year."[128] A year later, Hollies again described the population at Turtle Mountain:

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[124] Surrender, August 9, 1909, NA, RG 2, series 1, col. 115 (ICC Documents, Exhibit 1, p. 376).

[125] Canada, Order in Council PC 1788, August 28, 1909 (ICC Documents, Exhibit 1, p. 386).

[126] Canada, Order in Council PC 2876, November 21, 1913 (ICC Documents, Exhibit 1, pp. 546–49).

[127] John Hughes to Minister of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

[128] J. Hollies, Indian Agent, to F. Pedley, Deputy Superintendent General, April 1, 1910, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st March, 1910*, 108 (ICC Documents, Exhibit 1, p. 409).

"[T]here are now 8 Indians remaining on the Reserve, 2 of these will go to the Oak Lake Reserve, and the remaining 6 will probably go south, from whence they came."[129]

Distribution of Proceeds from the Sale of Turtle Mountain IR 60

An attempt by the Department of Indian Affairs to sell the four quarter sections of land (640 acres) on the Turtle Mountain reserve on December 15, 1909, met with no success because of the high valuation placed on it by the Indian Agent.[130] J.P. Morrison, the auctioneer of the abortive sale of the reserve, wrote to the department stating that Chief Hdamani had requested $2,000 for his claim related to the Turtle Mountain reserve.[131]

The Canupawakpa Dakota First Nation has not raised the issue of Canada's lawful obligation, if any, after the surrender, and we therefore make no findings in this regard. We outline sufficient detail here only to complete the story.

The claims and administration relating to the proceeds are complex, but it would appear from a review of the documents that

- Bogaga (a signatory of the surrender) requested $300 from the department as an early recompense for his lands and to secure a team of horses, a harness, and a rig at Oak River reserve.[132]
- In July 1910, the three families who had migrated to Oak Lake in 1898 requested that the department compensate them for their interests in the sale of the Turtle Mountain reserve.[133]

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129 J. Hollies, Indian Agent, to F. Pedley, Deputy Superintendent General, April 1, 1911, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st March, 1911*, 89 (ICC Documents, Exhibit 1, p. 443).

130 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, December 18, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 395).

131 J.P. Morrison, auctioneer, to the Department of Indian Affairs, January 8, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 398).

132 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, February 7, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 402).

133 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, July 14, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 415–16).

- When Agent Hollies visited Oak Lake IR 59 on July 5, 1910, he was asked to examine the issue of promises allegedly made by former Indian Agent Markle to the three families (Kasto, Kibana Hota, and Iyo-jan-jan) who migrated to Oak Lake reserve 12 years before.[134]

- John Thunder, the interpreter at that time, stated that Agent Markle had promised the transferring families a share in the reserve; Agent Hollies stated that this commitment was impossible because Mr. Markle would not make such an error.[135]

In response to Hollies' letter, on September 23, 1910, Indian Commissioner David Laird wrote a long account of the history of the Turtle Mountain Band in which he stated that a number of former members of the Band who did not take part in the surrender appear to have a claim to compensation.[136] He could not find transfer papers for the first three people on the list (Iyo-jan-jan, Widow Kasto, and Kibana Hota),[137] the first transferees of 1898.

All the Sioux who lived for many years at Turtle Mountain and who relocated to the Oak Lake reserve before the surrender were qualified by Laird as "squatters." Other Sioux who

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[134] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, July 14, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 415–16). In this letter, Indian Agent Hollies miscalculates the length of time since the three families had moved away from Turtle Mountain as being 15 years, when in fact it was 12 years. Hollies also refers to the third family's name as being "Old Mary's family." In all other references on record, this family was referred to as the Iyo-jan-jan family, so it can be safely assumed that "Old Mary's family" and the "Iyo-jan-jan" family are one and the same.

[135] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, July 14, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 415–16).

[136] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 423–29).
The list was as follows:

	Admitted to Oak Lake Reserve
Iyo-jan-jan,	May 24, 1898
Widow Kasto,	May 24, 1898
Kibana Hota,	May 24, 1898
George Nayiowaza,	August 27, 1908
Mahtaita,	August 27, 1908
Sam Eagle,	August 27, 1908
Hinhunsanna,	August 27, 1908
Mahtohkita,	September 16, 1908

[137] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 425–26).

disappeared from Turtle Mountain before the surrender were termed "stragglers."[138] Laird believed that at least some of the "squatters" should share in the proceeds of the sale of the Turtle Mountain reserve. He seems to have arrived at his suggested dispensation of proceeds on the basis that Hdamani and the other voting members had been "squatters" at Turtle Mountain, so it would be unfair to deny other long-term "squatters" who relocated to Oak Lake a share in the proceeds. Laird also advised that Chief Hdamani, Bogaga, and Bogaga's wife, being "old and helpless, as well as having a claim to the largest share in the funds, should be provided for while they live."[139]

Under his logic, Hdamani, Bogaga, and Bogaga's wife were each to receive $500 in a lump sum and $240 a year for the rest of their lives.[140] Tetunkanopa, Laird reasoned, should also receive $500 in a lump sum, but since he was younger than Hdamani and Bogaga, he should receive an annual share in the interest moneys on the proceeds. Hdamani's grandson Chaske and Tetunkanopa's son Charlie Tetunkanopa would receive $300 and interest moneys from the proceeds.[141] The remaining eight families who moved to Oak Lake reserve from Turtle Mountain, he argued, should receive $200 per family.[142] On the death of Hdamani, Bogaga, and Bogaga's wife, he said: "I would recommend that the whole principal money (and interest, if any) be placed to the credit of the Oak Lake band, or in fair proportion to any other band which has received into membership others in any

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138 David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 423, 426). Evidence in the record shows that a band member who appeared on the 1908 January census was told by the Chief of Police in November 1908 that he was no longer allowed to stay on the reserve (ICC Documents, Exhibit 1, p. 337).

139 David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 427).

140 David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 427).

141 David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 427).

142 David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 427–28).

way recognized as belonging to the Turtle Mountain band, as some compensation for giving the latter a share in their reserve."[143]

David Laird was mistaken in his belief that the reserve had already been sold, as the auction of the lands on Turtle Mountain was not carried out until May 3, 1911.[144] The sale of lands at Turtle Mountain represented 10 per cent of the total proceeds and resulted in the deposit of $632.50 into the accounts of the Turtle Mountain Band.[145]

On May 12, 1911, J.D. McLean wrote to Indian Agent Hollies and enclosed a cheque for $155 for Chief Hdamani as payment for his improvements on Turtle Mountain. McLean also asked Hollies to recommend to what extent the members of the Band who had settled on the other reserves should be assisted from the proceeds of the sale of the Turtle Mountain reserve.[146] On May 27, 1911, Hollies replied, asking for a payment of $630 for Bogaga.[147] This second request for aid to Bogaga again elicited a response from Laird, who wrote:

> Mr. Hollies, also appears to hold that only the five members of the Turtle Mountain band, who took part in the voting at the time of the surrender, have any claim to share in the proceeds of the sale. As I showed in my memo, to you, dated, the 23rd September, 1910, page 3, there were eight sioux, formerly of Turtle Mountain reserve, who were admitted into the Oak Lake band at different dates. These Indians loyally acceded to the wishes of the Department, and removed to Oak Lake, and ought not to be altogether overlooked now, when the reserve is sold, in the distribution of the proceeds.[148]

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143 David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 428).

144 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, May 5, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 447).

145 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, May 5, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 447).

146 J.D. McLean, Assistant Deputy & Secretary, Department of Indian Affairs, to J. Hollies, Indian Agent, May 12, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 456).

147 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, May 27, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 458–59).

148 David Laird, Indian Commissioner, to Accountant, June 19, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 464).

In response to a query from McLean, Hollies provided the Department of Indian Affairs with a list of the names and whereabouts of the eight Indians who had migrated from Turtle Mountain IR 60 to Oak Lake IR 59, along with the five who remained and voted on the question of the reserve. Of these five he wrote:

> No. 9 Tetunka-nopa, of Turtle Mountain reserve, and family are now in Montana
>
> No. 10 His son Charley, is also in Montana
>
> It is stated by Indians that Nos. 9 & 10 have become members of Fort Peck band of Indians and will only return for their share of funds from the sale of Turtle Mountain Indian Lands.
>
> No. 11. Hadamini, 74 years (Aug 16th), late chief of Turtle Mountain Indian reserve #60, is now on a visit to this Agency and reserves. He is unwilling to acknowledge the sale of reserve #60, and is not willing to take the $155.00 for his house. He stated that his grandson Charley Eagle was Part owner of the house as he had put on the roof, but the chief would make no statement in writing that I should pay a part to his grandson.
>
> He relies considerably upon a letter, with green ribbon and sealing wax from Lieutenant-Governor Morrison [sic Morris] stating he, the Governor, would do his best to secure a reserve for the Sioux Indians on Turtle Mountain. This letter I read to him, and explained as I have often done, that the majority in favour of selling the reserve always rules. I asked him to make this Oak River reserve his home. He said I might sell the reserve. Yes, I said, if fifty-one out of a hundred wanted to surrender it for that purpose, it would be sold. He wished me good-bye, as he would never see me again. I repeatedly asked him what should be done with the $155.00 allowed for his house, but he would make no statement as to that or of his future.
>
> No. 12. His grandson, Charley Eagle is visiting Oak Lake reserve #59, and applied for admittance, but the band asked $500.00 for this privilege. Nothing definite has been determined.
>
> No. 13. Bogaga, the last one of the Turtle Mountain reserve list is blind, and with his wife resides on Oak River reserve near his grand-daughter. This man with his wife has been rationed as a destitute for the last few years, part of the time at Turtle Mountain, part of the time at Oak Lake reserve, and the last year at Oak River reserve.... My plan in conjunction, was by means of his property, to make him independent of Department help, and that his friends should unite in assisting him.

> Bogaga, being blind, is dependent upon his wife. He should have a home of his own. Bogaga feels, that, by himself, he can do nothing.[149]

In April 1912, the Department of Indian Affairs approved the purchase of a team of horses for Bogaga at a cost of $500.[150] On August 18, 1912, Hdamani died at the Oak River reserve without realizing any moneys from the sale of Turtle Mountain IR 60.

Three separate distribution payments realized from the sale of Turtle Mountain IR 60 were allowed in 1913, 1914, and 1917. The first distribution, on February 8, 1913, was made not only to the parties at the surrender meeting but also to those who transferred to Oak Lake IR 59 in 1898 and 1908. The amount of each distribution varied. The second and third distributions in 1914 and 1917 were only to the parties, or their heirs, at the surrender meeting.[151] On March 23, 1956, a total of $20,534.27 was transferred from the Turtle Mountain Trust Fund Account into the Oak Lake Sioux Trust Fund Account "as compensation for taking 8 Turtle Mountain families into their membership."[152]

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[149] J. Hollies, Indian Agent, to J.D. McLean, Secretary, August 17, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1 pp. 479–81).

[150] J.D. McLean, Secretary, to J. Hollies, Indian Agent, April 3, 1912, NA, RG 10, vol. 3644, file 7785-1(ICC Documents, Exhibit 1, p. 499).

[151] B.E. Olson, Indian Affairs Branch, to W.C. Bethune, Acting Superintendent, Reserves & Trusts, Indian Affairs Branch, January 27, 1956, DIAND file 501/30-37-60, vol. 1 (ICC Documents, Exhibit 1, p. 648).

[152] Journal Voucher, S.A. Richards, Head, Trust Division, Indian Affairs Branch, March 23, 1956, DIAND file 501/30-37-60, vol. 1 (ICC Documents, Exhibit 1, p. 655).

PART III

ISSUES

By agreement of the parties, the Indian Claims Commission has been asked to inquire into the following issues:

1 Was Turtle Mountain Indian Reserve No. 60, also known as Section 31-1-22W, constituted and set aside by Canada as a reserve within the meaning of the *Indian Act*?

2 Does the surrender, purportedly made by the Turtle Mountain Band of Indians (the Band) on August 6, 1909 (the Surrender of 1909), accord with the provisions of the *Indian Act* of 1906, namely:

a) Was the party Bogaga habitually resident on or near and interested in the reserve at the time when the surrender was considered and approved at a meeting of Council, i.e., was Bogaga entitled to vote or be present at such a meeting of Council?

b) Were the requirements of the *Indian Act*, and in particular section 49(3) in terms of completion of the affidavit, properly complied with, i.e., was the assent by the Band certified on oath by some of the Chiefs or principal men present at the meeting and entitled to vote?

c) And if not, is the surrender invalid?

3 What duties and obligations, fiduciary or otherwise, if any, did Canada owe to the Band in relation to the interests of the Band and its members in the taking of reserve lands by way of surrender?

a) Did Canada owe a fiduciary obligation in respect of the taking of reserve lands?

b) Did Canada owe a duty to act without conflict of interest in respect of the said taking of reserve lands?

c) Did Canada owe a duty to act with reasonable care in protecting the interests of the Band and its members in respect of the said taking of reserve lands?

d) Did Canada owe a duty to act with honour in its dealing with the Band and its members in respect of the said taking of reserve lands?

e) Did Canada have a duty to act without the exercise of duress, undue influence, coercion, or other unfair practices in the course of conduct adopted by its agents in respect of the said taking of reserve lands?

4 Did Canada fail to fulfill any of the said duties or obligations to which it was subject?

5 If Canada failed to fulfill any of such duties or obligations, is said conduct by Canada sufficient to render void the Surrender of 1909 or to result in Canada's having an outstanding lawful obligation to the First Nation in respect of the taking of reserve lands?

NOTE: If issue 5 is ultimately answered in the affirmative, there will remain outstanding the question as to the extent to which the claimant First Nation should be entitled to compensation. Although the issue of compensation is not addressed by the Indian Claims Commission in respect of the inquiry into Canada's rejection of this Specific Claim, the First Nation claimant reserves its right to address the issue of compensation subsequently should it become appropriate to do so.

PART IV

ANALYSIS

The Indian Claims Commission has been asked in this inquiry to determine whether Canada owes an outstanding lawful obligation to the Canupawakpa Dakota First Nation as a result of events surrounding the surrender of Turtle Mountain IR 60 in 1909. By agreement of the parties, the Commission has been asked to inquire into a number of issues. These issues can be divided into two categories: statutory compliance and fiduciary duty. In the first category, the Commission discusses the reserve as a *de facto* reserve and reviews the statutory requirements for surrender to determine the validity of the surrender – namely, that the signatories be habitually resident on the reserve; that the signatories be near to and interested in the reserve; the entitlement of the voter Bogaga; and the completion of the affidavit.

Next, the Commission examines the issues related to the duties and obligations potentially owed to the Band with respect to the taking of reserve lands by surrender. In preparation for this inquiry, the parties agreed on the issues as outlined in Part III of this report. In particular, the Commission was asked to determine if any fiduciary obligations were owed with regard to the taking of reserve lands – namely, whether Canada owed a duty to act without conflict of interest; a duty to act with reasonable care; a duty to act with honour; and a duty to act without the exercise of duress, undue influences, or unfair practices with respect to the taking of the reserve. In their written and oral submissions on these issues, the parties chose to depart from their agreed-on formulation of the issues and instead chose to present their arguments regarding these enumerated duties following a *Guerin* and *Apsassin* analysis. The Commission has, therefore, undertaken an analysis of the adequacy of the Band's understanding of the terms of surrender; whether the Band abnegated its decision-making power to the Crown; and whether the Crown engaged in either tainted dealings or accepted a decision of the Band which amounted to an exploitative bargain.

If any or all of these obligations were owed to the First Nation, the Commission will determine whether Canada fulfilled the duties or obligations to which it was subject and, if not, whether this conduct is sufficient to void the surrender or otherwise create an outstanding lawful obligation to the First Nation. If this last question is answered affirmatively, the issue of compensation remains. While the issue of compensation is not addressed by the Indian Claims

Commission in this inquiry into Canada's rejection of this Specific Claim, the First Nation reserves the right to address the issue of compensation subsequently should it become appropriate to do so.

Issue 1 Validity of the Reserve and Its Surrender

Was Turtle Mountain Reserve No. 60, also known as Section 31-1-22W, constituted and set aside by Canada as a reserve within the meaning of the *Indian Act*?

This issue is no longer outstanding and does not require determination by the Commission. In accordance with the January 23, 1995, letter from Canada to Chief Alvina Chaske about the preliminary federal position on this claim,[153] the Commission and the parties all accept that the land in question was a *de facto* reserve. In its original rejection of this claim, Canada took the position that "[i]t was not necessary to decide this issue in order to come to a conclusion on the claim, therefore it has been assumed that Section 31-1-22-W1 was a reserve within the meaning of the *Indian Act*."[154] In the initial planning conference of this inquiry, the First Nation raised the question of the legal status of Turtle Mountain IR 60 as a matter to be determined by the Commission; during the course of this inquiry, however, Canada clarified its view: "[T]heTurtle Mountain No. 60 became a *de facto* reserve at the latest by 1890 because of its clear demarcation, its treatment by the Crown and its continued use by the Turtle Mountain band. In particular, the Crown treated the tract as a reserve when it obtained the surrender in 1909."[155] This admission was accepted by the First Nation.

As a result, the analysis of the remaining issues is founded on the position that Turtle Mountain had become a *de facto* reserve.

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153 Jack Hughes, Research Manager, Specific Claims West, DIAND, to Chief Alvina Chaske, Oak Lake Sioux First Nation, January 23, 1995, file BW8260/MB289-C1 (ICC Exhibit 16a).

154 Jack Hughes, Research Manager, Specific Claims West, DIAND, to Chief Alvina Chaske, Oak Lake Sioux First Nation, January 23, 1995, file BW8260/MB289-C1 (ICC Exhibit 16a).

155 Uzma Ihsanullah, Counsel, DIAND, Legal Services, to Kathleen Lickers, Commission Counsel, ICC, and Paul Forsyth, Counsel, Taylor McCaffrey, February 9, 2001 (ICC file 2106-13-01, vol. 1).

ISSUE 2 DOES THE SURRENDER OF 1909 ACCORD WITH THE *INDIAN ACT* OF 1906?

Does the surrender, purportedly made by the Turtle Mountain Band of Indians (the Band) on August 6, 1909 (the Surrender of 1909), accord with the provisions of the *Indian Act* of 1906?

We shall examine this issue through three sub-issues, 2(a), 2(b), and 2(c).

Issue 2(a) Was Bogaga Entitled to Vote at a Meeting of Council?

Was the party Bogaga habitually resident on or near and interested in the reserve at the time when the surrender was considered and approved at a meeting of Council, i.e., was Bogaga entitled to vote or be present at such a meeting of Council?

The statutory provisions to be followed in the taking of a surrender are found in section 49 of the 1906 *Indian Act*:

> 49(1) Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> (2) *No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.*
>
> (3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the Province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.

> (4) When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[156]

Section 49 requires that, in order to vote on the question of a surrender of reserve land, a person must be a male band member over the age of 21 who "habitually resides on or near" the reserve in question and who "is interested in" the reserve. The primary issue is whether Bogaga was habitually resident on the reserve at the time of the surrender vote. The question whether Bogaga habitually resided "near" the reserve need be examined only if we do not find him to be habitually resident on the reserve. With respect to Bogaga's eligibility to vote, the other requirements of the statute are not in issue, although we shall comment on the element of "interested in" as it relates to Bogaga.

Did Bogaga Habitually Reside on or near the Reserve?

The First Nation takes the position that Bogaga was no longer resident at Turtle Mountain at the time the surrender vote was taken and, therefore, he was ineligible to vote. In its submission, the First Nation states:

> Evidence indicates that prior to the Surrender vote, Bogaga was no longer habitually residing on or near the Turtle Mountain Reserve. In addition, evidence supports the view that Bogaga was completely under the control and influence of Indian Agent Hollies as was, for that matter, the entire timing, process and outcome of the so called Surrender vote.[157]

The First Nation relies heavily on Agent Hollies' April 28, 1909, letter to the Secretary of Indian Affairs in which Hollies reports "that Bogaga who has long been a victim to painfully weak eyes is now blind and is living on the Oak River reserve #58 where I can look after him."[158] Counsel for the First Nation argues that "at this stage, although the [March 11, 1909] meeting took place at the house of Hdamani, there is no express indication that Bogaga was residing at the Turtle Mountain Reserve

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156 *Indian Act*, RSC 1906, c. 81, s. 49. Emphasis added.

157 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 4.

158 J. Hollies, Acting Indian Agent, Griswold Agency, to the Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 369), in Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 14.

at this time. On the contrary, the evidence suggests that by this time Bogaga had moved his residence to the Oak River Reserve."[159]

In contrast, Canada takes the position that the central piece of undisputed evidence is the affidavit sworn by Tetunkanopa dated August 9, 1909, attesting that the surrender was properly taken from all eligible voters.[160] Canada also relies on the principles of statutory interpretation identified in several sources[161] and looks to the historical documentation and the community evidence to arrive at its position. On that basis, Canada holds that Bogaga was habitually resident at Turtle Mountain at the time of surrender and was therefore an eligible voter.

In particular, Canada submits that, although the phrase "habitually resides" has not been the subject of judicial interpretation in the context of the *Indian Act*, it should be defined according to the standard developed in *Dicey and Morris on the Conflict of Laws*:

> It is evident that "habitual residence" must be distinguishable from mere "residence". The adjective "habitual" indicates a quality of residence rather than its length. Although it has been said that habitual residence means "a regular physical presence which must endure for some time", it is submitted that the duration of residence, past or prospective, is only one of a number of relevant factors; there is no requirement that residence must have lasted for any particular minimum period.[162]

The 1987 Alberta Court of Appeal case of *Adderson v. Adderson*, cited by Canada, confirms that, in Canadian law, the test to be used for "habitual residence" is the quality of residence.[163] The court stated that the quality of residence is determined by weighing a number of different factors,

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159 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 14.

160 Surrender Affidavit, August 9, 1909 (ICC Documents, Exhibit 1, p. 378), as cited in Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 12.

161 J.H.C. Morris, ed., *Dicey and Morris on the Conflict of Laws*, 10th ed. (London: Stevens & Sons, 1980), 144–45; *Adderson v. Adderson* (1987), 36 DLR (4th) 631 (Alberta CA); *Canard v. Attorney General of Canada and Rees*, [1972] 5 WWR 678 at 682 (Manitoba CA), affirmed by *Canard v. Canada*, [1976] 1 SCR 170, on the same grounds; Indian Claims Commission, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000), 12 ICCP 55.

162 J.H.C. Morris, ed., *Dicey and Morris on the Conflict of Laws*, 10th ed. (London: Stevens & Sons, 1980), 144–45, as quoted in Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 10.

163 *Adderson v. Adderson* (1987), 36 DLR (4th) 631.

with duration being but one of them. It was also found that "habitual residence" exists on a continuum somewhere between mere residence and domicile. Habitual residence, Canada argues, is established in a particular place if the person "resides there for a time and with a continuity that indicates more than mere physical presence at a location."[164]

Canada also submits that the standard of "ordinary residency" should be determined according to the principles established in the Supreme Court of Canada's decision in *Canard v. Attorney General of Canada and Rees*.[165] In this case, the courts were asked to decide, for estate administration purposes, whether a deceased Indian, at the time of his death, ordinarily resided on the Fort Alexander reserve. The Court determined that a person is "ordinarily resident" if there is some degree of continuity, even if there has been an established pattern of temporary, occasional, or casual absences.[166]

The Commission has previously considered the meaning of "habitually resides on or near" and the *Canard* decision in *Duncan's First Nation Inquiry 1928 Surrender Claim*.[167] As stated in the *Duncan's First Nation* Report,[168] there does not appear to be any reported decision that has considered the meaning of the phrase "habitually resides on or near, and is interested in the reserve in question" within the context of the *Indian Act*. Accordingly, the First Nation submits that the meaning of this phrase must be gleaned from the findings of the Commission in the *Duncan's First Nation* Report:

> [W]e take from these authorities [*Canard, Adderson*] that an individual's "habitual" place of residence will be the location to which that individual customarily or usually returns with a sufficient degree of continuity to be properly described as settled, and will not cease to be habitual despite "temporary or occasional or casual absences."

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164 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 10.

165 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 11.

166 *Canard v. Attorney General of Canada and Rees*, [1972] 5 WWR 678 at 682 (Manitoba CA).

167 Indian Claims Commission, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000), 12 ICCP 55.

168 Indian Claims Commission, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000), 12 ICCP 55.

> Although such residence entails "a regular physical presence which must endure for some time," there is no fixed minimum period of time and the duration of residence, past or prospective, is only one of a number of relevant factors, the quality of residence being the overriding concern. It is not clear to us that there is a significant difference between "habitual" and "ordinary" residence, and similarly we are unsure whether it matters on the facts of this case.[169]

We are prepared in this claim to adopt the definition in the *Duncan's First Nation* Report. In particular, we must examine on the facts of this case whether Turtle Mountain was the location to which Bogaga customarily or usually returned "with a sufficient degree of continuity to be properly described as settled" and to which he did not cease to be a habitual resident despite "temporary or occasional or casual absences." In addition, we consider the quality of Bogaga's residence to be of paramount concern. In our view, only a detailed examination of the evidence related to Bogaga's residency can assist in making this determination. The evidence leading up to and following the August 6, 1909, surrender vote can be summarized as follows:

- *1862–circa 1940s*: Sioux Indians divide their residency over what becomes the international border between Canada and the United States.[170]
- *January 4, 1873*: Sioux Indians, 80 families, are said to be living in the border territory near the international boundary line. Sioux leadership petitions for reserve land after an exodus from the United States.[171]

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[169] Indian Claims Commission, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000), 12 ICCP 55 at 172–73, as quoted in Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 11.

[170] Peter Douglas Elias, *The Dakota of the Canadian Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988) (ICC Exhibit 11, pp. 17, 22); J.A. Markle, Indian Agent, Birtle Agency, to Superintendent General of Indian Affairs, July 30, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896* (ICC Documents, Exhibit 1, pp. 216–25); ICC Transcript, December 7, 2001 (ICC Exhibit 14a, pp. 16, 77, S. Wasteste; p. 32, Morris Kinyewakan; p. 47, Aaron McKay); ICC Transcript, January 17, 2002 (ICC Exhibit 14b, p. 195, Philip HiEagle).

[171] Alexander Morris, Lieutenant Governor, Province of Manitoba & the NWT, to Minister, Department of the Interior, August 4, 1873, NA, RG 10, vol. 3605, file 2905 (ICC Documents, Exhibit 1, pp. 1–9), Original and Copy of a "Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in Council on the 4th January 1873."

- *February 17, 1874*: Bogaga writes a letter from Turtle Mountain to the Commissioner of the [International] Boundary Commission requesting planting materials and horses.[172]

- June 26, 1877: Bogaga appears on "a list of names of the Sioux of Turtle Mountain" prepared by Alexander Morris after a visit with Hdamani.[173]

- *May 23, 1898*: In correspondence with the "Indian Department," Indian Missionary John Thunder indicates that three families have moved from Turtle Mountain following direction from the "Indian Department."[174] Thunder identifies Bogaga as the head of one of the three families remaining at Turtle Mountain. Chief Hdamani and Tetunkanopa are the other heads of families.

- *April 23, 1901*: Bogaga appears on the official census of Canada for the Municipality of Winchester, township 23, range 22 (Turtle Mountain).[175]

- *Circa August 13, 1907*: Indian Agent Hollies reports that, after touring the Turtle Mountain reserve, he saw only "rightful" inhabitants of the reserve.[176]

- *January 31, 1908*: Bogaga and his wife are identified as old and feeble; Indian Agent Hollies states they should be provided for as "Old and Destitute"[177] and could be moved to the Oak River Reserve. Accompanying this report is Agent Hollies' "Tabular Statement on Turtle Mountain Reserve IR 60 as to population, age and sex." Bogaga's name and his age, 80, appear on this statement.[178]

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[172] Bogaga, Turtle Mountain, to Captain D.R. Cameron, Commissioner, International Boundary Commission, February 17, 1874, NA, FO 302/3, reel B-5320 (ICC Exhibit 12, pp. 55–56).

[173] Alexander Morris, Lieutenant Governor, Province of Manitoba & the NWT, to Minister, Department of the Interior, June 26, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 49).

[174] John Thunder, Indian Missionary, to the Indian Department, May 23, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 241).

[175] Excerpts of the "Fourth Census of Canada, 1901," NA, vol. 1, reel T-6432 (ICC Exhibit 13a, p. 1, line 28).

[176] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, August 1907, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 287–90).

[177] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 291–98).

[178] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 296, 298–99).

- *July 2, 1908*: Agent Hollies writes: "Bogaga #2 is at Fort Totten as he is very old I shall upon his return endeavour to persuade him also to join Hadamani on the Oak River reserve and live a free and easy life and a sure living for the rest of his days."[179]

- *August 11, 1908*: Agent Hollies' report indicates that Hdamani and Bogaga will not consent to live at the Oak River reserve. They are given provisions to last until September and advised to speak to Hollies at the Griswold Agency for more provisions.[180]

- *November 2, 1908*: Hdamani and Bogaga receive food orders to last until the end of December at Turtle Mountain. Each receives a blanket.[181]

- *March 15, 1909*: In this letter, Agent Hollies writes to the Indian Commissioner that, having met with the three remaining members at Hdamani's place:

> I have the honour to state that two members out of the three owning the reserve, that is, Bogaga #2 and Tetunkanopa #3 have declared their desire to Surrender the reserve lands; whilst the third, Hadamani #1, wishes to hear direct from you, the Head, as to your wishes in the matter, as he says "Whatever the head wishes me to do, I will carry out."[182]

- *April 28, 1909*: Agent Hollies reports on two visits to the Turtle Mountain IR 60. His first visit is on March 11, 1909, when he reports that "the three members of the band met at the house of Hdamani." His second visit is on April 22, when he meets with Hdamani and Bogaga. Hollies states that Hdamani will not heed the Commissioner's advice to surrender the reserve, as set out in a letter to Hdamani, "but takes the position very strongly, that he alone owns the reserve, that Bogaga has no say in the matter neither has Tetunkanopa." In addition, Hollies writes:

> If I may, I would beg to call attention to the "Surrender Papers" and request that a new form in duplicate be forwarded to this Agency, redated, and with the word "Chief" expunged; then as soon as I can find Tetunkanopa and get him here, I will arrange to secure "Surrender to the King" (2 to 1) of the

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179 J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 315).

180 J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 320).

181 J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, November 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, pp. 336–38).

182 J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, March 15, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, pp. 359–60).

> reserve. I would report that Bogaga who has long been a victim to painfully weak eyes is now blind and is living on the Oak River reserve #58 where I can look after him.[183]

- *August 6, 1909*: According to Hollies' report of August 12, 1909, the surrender meeting is held at Hdamani's house on this date and the surrender vote is taken: Bogaga, Tetunkanopa, and his 22-year-old son, Charlie, vote in favour of surrender; Hdamani and his 22-year-old grandson, Chaske, vote against it.[184]

- *August 9, 1909*: The surrender document is signed and the proof of assent affixed.[185] Notably, there is no objection to Bogaga signing the surrender at this time.

- *August 12, 1909*: Indian Agent Hollies reports on the surrender process and directs a copy of the surrender document to Indian Commissioner David Laird. The report states that he visited the reserve at the Commissioner's behest on August 5 and provided notice that there would be a meeting on the 6th to consider surrendering the reserve. The meeting took place at Hdamani's home on the 6th and the vote result and witnessing occurred as follows:

> Bogaga #2, Tetunka-Nopa #3, and his son Charlie (now 22 years) voted in favour of Surrender; three; while Hadamani #1, and his grandson Chaske, (now 22 years) voted against it.... Immediately afterwards, Bogaga, with Tetunka-nopa and his son Charlie, proceeded to Deloraine to sign Surrender papers, and Tetunka-nopa to make Affidavit as required with myself as Bogaga is blind. But here at Deloraine, and within reasonable distance, was not to be found A competent person such as the Indian act requires before whom I with Tetunka-nopa, could certify on oath, that such "Surrender" had been assented to by the band; and finally had to be deferred till the 9th, when I could secure a J.P. from Medora to visit Deloraine for that purpose.[186]

- *August 12, 1909*: In the same report, Indian Agent Hollies attaches a table showing "improvements and owners of improvements on Turtle Mountain #60 at date of surrender

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183 J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 367–69).

184 J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–84).

185 Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1, and also DIAND, Land Registry Office, Instrument Number 15907 (ICC Documents, Exhibit 1, pp. 375–81).

186 J. Hollies, Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–84).

August 9/09." Bogaga's name, with $26 in improvements for a house and stable, is on the list.[187]

- *September 2, 1909*: Deloraine resident John Hughes writes to the Minister of the Interior on Hdamani's behalf, requesting proceeds from the surrender of the reserve and claiming that Bogaga's and Tetunkanopa's receipt of their share of the proceeds in the absence of Hdamani's receipt of his share is unjust. Hughes also states that Bogaga and Tetunkanopa have moved away to another reserve.[188]

- *February 7, 1910*: Hollies reports that "Bogaga, who is blind, and with his wife lives on the Oak River Res. and are rationed by me..."[189]

- *May 27, 1911*: Hollies reports: "This leaves only blind Bogaga and his wife, who intend to build and reside [on] the Oak River reserve, near the Grand-daughter's residence which is 2 miles North of this Agency. This grand-daughter has been looking after him the last 3 years."[190]

- *August 17, 1911*: Hollies reports that "Bogaga ... is blind, and with his wife resides on Oak River reserve near his grand-daughter. This man with his wife has been rationed as a destitute for the last few years, part of the time at Turtle Mountain, part of the time at Oak Lake reserve, and the last year at Oak River reserve."[191]

- *March 25, 1912*: Hollies reports that Bogaga's granddaughter and her husband, Angus McKay, have looked after Bogaga and his wife now for three years.[192]

- *Circa 1920s*: Agnes Young, born at Oak Lake reserve in 1910, testified at the community session that, after Bogaga and his wife left Turtle Mountain, they moved first to Sioux

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187 J. Hollies, Indian Agent, to J.D. McLean, Secretary, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 384).

188 John E. Hughes to Minister, Department of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

189 J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, February 7, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 402).

190 J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, May 27, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 458).

191 J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 17, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 481).

192 J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, March 25, 1912, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 494).

> Valley, then to Oak Lake, where Mrs Young, as a girl, took care of him while his wife worked. Mrs Young stated that Bogaga, who was old and blind at the time, returned to Sioux Valley, where he died.[193]

Although the testimony provided at the community sessions for this inquiry assists in understanding the movements of Bogaga in the months following the surrender, it does not provide detailed information about Bogaga's residence on August 6, 1909, the date of the surrender meeting. Agnes Young's testimony is based primarily on her personal knowledge of Bogaga after he came to the Oak Lake reserve from Sioux Valley[194] and is understandably limited in establishing the precise time when Bogaga moved from Turtle Mountain. In response to Commission counsel's inquiry as to the date when Bogaga came to Oak Lake, Mrs Young, through interpreter Rosie Chaskie, replied: "After he got kicked out. They lived in Sioux Valley, but then they came over here [Oak Lake] and his wife worked, so she [Agnes Young] looked after him, fed him whatever his wife left cooked."[195]

In addition, the oral testimony of Elder Gordon Stewart Wasteste, while beneficial, did not provide us with enough information with respect to Bogaga to support the First Nation's position that he was not habitually resident on the Turtle Mountain reserve at the time of the surrender. Elder Wasteste's evidence only peripherally addressed the nature of Bogaga's residency:

> MS. LICKERS: ... Stewart, you mentioned other men, the men you just mentioned, Bogaga.
> MR. WASTESTE: Yes.
> MS. LICKERS: Who was he?
> MR. WASTESTE: That's my great-grandfather.
> MS. LICKERS: What do you remember people speaking about him, the stories about him? He lived at Turtle Mountain?
> MR. WASTESTE: Yes, he lived at Turtle Mountain.
> ...
> MS. LICKERS: Would he have been there when they surrendered the land or sold the land?

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193 ICC Transcript, January 17, 2002 (ICC Exhibit 14b, pp. 239–40 and 251–52, Agnes Young).

194 ICC Transcript, January 17, 2002 (ICC Exhibit 14b, pp. 239–40 and 251–53, Agnes Young).

195 ICC Transcript, January 17, 2002 (ICC Exhibit 14b, p. 251, Agnes Young).

> MR. WASTESTE: He was there, yes, he was supposed to be there, that is what they said, they were there.[196]

Later, when asked by Commission counsel if Bogaga was living at Sioux Valley when the Turtle Mountain reserve was surrendered, Mr Wasteste replied, "No, I don't think so. What I understand is, no, they weren't. They never talked about that, but I think they were living over there until after the war."[197] At a minimum, Mr Wasteste's testimony corroborates the information in the written historical record, which suggests that Bogaga was living at Turtle Mountain at the time of the surrender.

In particular, the March 15, 1909, report that Agent Hollies sent to Commissioner Laird provides us with a benchmark for determining the "habitual residence" issue. At that time, there was no mention by either Agent Hollies or Hdamani that Bogaga was no longer living at Turtle Mountain reserve. It is most likely, given Hdamani's comfort with protest and voicing concern,[198] that if Bogaga no longer had residency at the Turtle Mountain reserve, and therefore no right to vote, Hdamani would have made this known through a third party or the Indian Agent. In addition, Indian agents from Markle to Hollies had reported the relocation of many of the members of Turtle

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196 ICC Transcript, December 7, 2001 (ICC Exhibit 14a, pp. 19–20, Stewart Gordon Wasteste and Kathleen Lickers).

197 ICC Transcript, December 7, 2001 (ICC Exhibit 14a, p. 76, Elder Stewart Gordon Wasteste).

198 Chief Hdamani, Turtle Mountain Sioux, to Captain D.R. Cameron, Commissioner, International Boundary Commission, January 26, 1874, NA, RG 10, vol. 3607, file 2988 (ICC Documents, Exhibit 1, pp. 12–13); Chief Hdamani, Turtle Mountain Sioux, to unidentified recipient, April 1, 1893, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 195); John E. Hughes to Minister, Department of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

Mountain reserve as they moved,[199] and there is little likelihood of Agent Hollies having failed to report to Ottawa the permanent relocation of a member he wrote about on several occasions.

It is also important to note that Bogaga's continuity of residency at Turtle Mountain extended from, at the latest, 1874[200] to April 28, 1909, when we have the first notice from Indian Agent Hollies that Bogaga was "living" at the Oak River reserve. It is evident from the historical record that he had regular residency at Turtle Mountain throughout this time.[201] In our view, this length of residency can accurately be called settled. It is also clear from the record that Bogaga maintained a house and stable at the reserve until after the date of the surrender.[202] It is also evident that, although Agent Hollies did not consider Bogaga to be staying at that time on the Turtle Mountain reserve, Bogaga was certainly not a resident of another reserve, in particular the Oak River reserve, nor is there evidence that he had applied to be a member of that reserve. On the balance of the evidence, no other inference can be drawn but that Bogaga was a continual resident of the Turtle Mountain reserve.

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199 G.H. Wheatley, Indian Agent, Birtle Agency, to Secretary, Department of Indian Affairs, March 25, 1902, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 270); J.A. Markle, Indian Agent, Birtle Agency, to Indian Commissioner, Department of Indian Affairs, September 1, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 259); J.A. Markle, Indian Agent, Birtle Agency, to Secretary, Department of Indian Affairs, August 9, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 258); J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908 (ICC Documents, Exhibit 1, pp. 291–98); J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 319–20); J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, August 12, 1908, NA, RG 10, vol. 3869, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 321–25).

200 Bogaga, Turtle Mountain, to Captain D.R. Cameron, Commissioner, International Boundary Commission, February 17, 1874, NA, FO 302/3, reel B-5320 (ICC Exhibit 12, pp. 55–56). In this letter, Bogaga's home is identified as Turtle Mountain, and it is likely he had been there for 12 years before this date; Chief Hdamani, Turtle Mountain, to Captain D.R. Cameron, Commissioner, International Boundary Commission, January 26, 1874, NA, RG 10, vol. 3607, file 2988 (ICC Documents, Exhibit 1, pp. 12–13). Chief Hdamani stated that he had been at Turtle Mountain for 12 years. Given the duration of their association, it is probable that Chief Hadamani and Bogaga resided in the same place during that time.

201 ICC Transcript, December 7, 2001 (ICC Exhibit 14a, p. 231, Agnes Young; pp. 18, 20, S. Wasteste; p. 239, Agnes Young); John Thunder, Indian Missionary, to Indian Department, May 23, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 241); J. Hollies, Acting Indian Agent, Griswold Agency, to Indian Commissioner, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 313–16).

202 J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–84).

Based on the evidence, although there was a degree of continuity in Bogaga's residence at Turtle Mountain, there were temporary, occasional, and casual absences. For example, Agent Hollies reported that Bogaga visited Fort Totten reserve, North Dakota, in June 1908.[203] It is also possible, although not certain, that he was in Fort Totten with other Turtle Mountain families in June and July 1909, returning to Turtle Mountain on August 2, one week before the surrender vote.[204] The *Canard* standard speaks directly to the *quality* of residence on reserve and the existence of continuous residence, even given temporary, occasional, and casual absences. Based on the *Canard* standard, therefore, Bogaga's temporary, occasional, and casual absences would not have detracted from the fact of his continuity of residence on the Turtle Mountain reserve.

It is true that Turtle Mountain was perceived to be a staging area where Sioux people celebrated and frequently crossed the international boundary. It does not follow from this fact, however, that Bogaga was not habitually resident at the Turtle Mountain reserve. Rather, his travel patterns reflected those of many Sioux people who maintained multiple residences according to the seasons. Both written and oral histories support this determination.[205] Seasonal patterns of attendance in different locations for different purposes do not detract from his enduring physical presence at Turtle Mountain. While there is evidence that Bogaga was periodically absent from Turtle Mountain, it does not establish that he had permanently moved from the reserve. For example, after his trip to the Fort Totten reserve in June 1908, he returned to the Turtle Mountain reserve. It is likely that Bogaga, like other Turtle Mountain Sioux, followed the yearly pattern of travelling to Fort Totten and returning home afterward.

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[203] J. Hollies, Acting Indian Agent, Griswold Agency, to Indian Commissioner, Department of Indian Affairs, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 315).

[204] J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 382).

[205] George A. Hill to Captain D.R. Cameron, Commissioner, International Boundary Commission, May 18, 1874, NA, FO 5/1669, reel B-1153 (ICC Exhibit 12, pp. 69–71); Alexander Morris, Lieutenant Governor, Province of Manitoba & the NWT, to Minister, Department of the Interior, February 26, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 23–26); J.A. Markle, Indian Agent, Birtle Agency, to Superintendent General, Department of Indian Affairs, July 30, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896*, 142–51 (ICC Documents, Exhibit 1, pp. 216–25); ICC Transcript, December 7, 2001 (ICC Exhibit 14a, pp. 16 and 77, S. Wasteste; p. 32, Morris Kinyewakan; p. 47, Agnes McKay; p. 195, Philip HiEagle).

There is no paper trail that allows us to ascertain exactly where Bogaga was at the operative time. In addition, some of Hollies' reports on Bogaga's whereabouts in the years following the surrender are inconsistent with the April 28, 1909, letter[206] suggesting instead that Bogaga made the transition from Turtle Mountain to Oak River in the period after the surrender. Thus, in order to make a final determination in the absence of clear, unequivocal evidence, we look again to the legal test for "habitually resident" summarized by the Commission in the *Duncan's First Nation Inquiry 1928 Surrender Claim* – namely, "the location to which that individual customarily returns" with "a sufficient degree of continuity" to be "settled," even with "temporary or occasional or casual absences," and "a regular presence which must endure for some time," with "the quality of residence being the overriding concern."[207]

As relocation of Turtle Mountain residents was a prime stated goal for Agent Hollies, he would most certainly have recorded the fact if Bogaga had initiated a permanent (by band transfer or other means) residence on another reserve. There is no evidence of Bogaga's consent to transfer or of any receiving band's acceptance, as there is for the previous relocations of families from Turtle Mountain in 1908. In addition, in correspondence from Agent Hollies dated April 28, 1909, to the Secretary of Indian Affairs, it is evident that Bogaga was present for the meetings to discuss a possible surrender when Hollies visited the reserve on March 11 and again on April 22 of that year.[208] Bogaga was also present at Turtle Mountain for the surrender meeting on August 6, 1909. We cannot infer, as the First Nation has done,[209] that Agent Hollies was exerting complete control over Bogaga at this time and that he was transporting Bogaga from the Oak River reserve to Turtle Mountain for the surrender discussions. There is simply no evidence to support this inference.

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206 See in particular J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, May 27, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Exhibit 1, pp. 458–59); J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 17, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 479–82).

207 Indian Claims Commission, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000), 12 ICCP 55 at 172–73.

208 J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 319–20).

209 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 15.

It is also worth noting that in the September 2, 1909, letter from John Hughes to the Minister of the Interior, approximately one month after the surrender vote, Hughes stated that Bogaga and Tetunkanopa had moved from Turtle Mountain and that each man had received money for doing so. This letter marks the first time, other than Hollies' April 28 letter, that Bogaga's relocation from the Turtle Mountain reserve is recorded in writing.[210]

Basing our analysis on *Canard* and *Adderson,* as summarized in the *Duncan's* report, we find that Bogaga customarily and usually returned to Turtle Mountain and that his quality of residence was such that he was habitually and ordinarily resident on the Turtle Mountain reserve. It is our determination that this pattern and his long-term residency at Turtle Mountain are sufficient to qualify Bogaga as "settled." In addition, Bogaga did not cease to be habitually resident despite "temporary or occasional or casual absences." It is evident from the written record that Bogaga maintained a regular physical residence on Turtle Mountain, even during the period in which the First Nation argues he had moved from Turtle Mountain to Oak River to live with his granddaughter.

We also think that the duration of his residency at Turtle Mountain is just one factor to be observed in this assessment. Bogaga's adherence to Dakota traditions of temporary relocation,[211] his blindness and failing health,[212] his full participation in matters and decisions related to the reserve,[213]

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210 John E. Hughes to Minister, Department of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

211 J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908 (ICC Documents, Exhibit 1, pp. 291–98); J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, August 1907, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 287–90).

212 J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908 (ICC Documents, Exhibit 1, p. 296); J. Hollies, Acting Indian Agent, Griswold Agency, to Indian Commissioner, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 315); J. Hollies, Acting Indian Agent, Griswold Agency, to the Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 369).

213 J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 319–20); J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, March 15, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, pp. 359–60); J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 367–69); Turtle Mountain Band of Indians, Surrender and Affidavit , August 9, 1909, NA, RG 10, vol. 3644, file 7785-1(ICC Documents, Exhibit 1, pp. 375–81).

and respect for his decision to surrender the reserve are also relevant factors we have examined in making this determination. We have also taken into consideration his documented residency (1874–1909) and his probable residency (1862–1909) to find that Bogaga maintained habitual residence at Turtle Mountain for at least 35 (and perhaps 47) years. It is important that his entitlement not be disregarded in any event; we would be loath to interfere with a residence of this duration at Turtle Mountain.

The First Nation's counsel argues, however, that there is sufficient direct evidence in Indian Agent Hollies' April 28, 1909, letter referring to Bogaga's living at Oak River to establish that Bogaga was neither habitually resident on nor near the Turtle Mountain reserve.[214] Counsel also argues that inferences should be made that references to Bogaga's inability to cultivate land and his feeling of helplessness support his relocation to the Oak River reserve.[215] With respect, we do not agree with this submission. Although Bogaga may have left the reserve for health or other reasons occasionally, there is scant evidence on which to base a decision that he had left his continual residence before August 6, 1909. [216]

In conclusion, the Commission has a duty to decide where, on the face of the record before it and including both the documentary history and the oral testimony of elders, Bogaga habitually resided on August 6, 1909. The First Nation has not been able to point to any compelling evidence that would rebut the conclusion that Bogaga, a long-standing resident of the Turtle Mountain reserve, was an habitual resident anywhere but at Turtle Mountain when the surrender vote was taken.

We agree with Canada that the affidavit signed on August 9 by Tetunkanopa, certifying that "no Indian was present or voted at such council or meeting who was not a habitual resident on the Reserve,"[217] is persuasive of the fact of Bogaga's habitual residency. We also find that Bogaga likely changed his habitual residency to Oak River in the weeks following the surrender vote, given

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214 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 14.

215 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 14.

216 John E. Hughes to Minister, Department of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

217 Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1(ICC Documents, Exhibit 1, p. 378).

Hughes's letter of September 2, 1909, stating that Bogaga had moved with a sum of money to Oak River.[218] In reaching this decision, we accept the statement of Stewart Gordon Wasteste, Bogaga's great-grandson. Mr. Wasteste, when asked whether Bogaga would have lived in Sioux Valley (Oak River) when the reserve was surrendered, stated that his understanding was that Bogaga lived at Turtle Mountain at the time of the surrender.[219]

It is reasonable to assume that Bogaga maintained his habitual residence at Turtle Mountain until some time after August 6, 1909, and was therefore entitled to vote on the surrender. To conclude otherwise would be tantamount to effecting a disentitlement of a member of the Band from the expression of his will, a finding we would not support, given the grave importance of a vote to surrender reserve lands.

Our finding that Bogaga was habitually resident on the Turtle Mountain reserve during the relevant period obviates the need to examine the alternative requirement of section 49(2) of the *Indian Act* – that the voter be habitually resident at a place "near" the reserve in question.

Was Bogaga Interested in the Reserve?

The 1906 *Indian Act* also required that, in addition to having a habitual residence on or near the reserve, an Indian would be entitled to vote on a surrender of reserve lands only if he were "interested in the reserve in question."[220] The First Nation did not raise this statutory requirement as an issue, assuming no doubt that Bogaga retained an interest in Turtle Mountain regardless of the place of his habitual residence. Nevertheless, for clarity, we shall comment on this requirement in the context of Bogaga's entitlement to vote.

As this Commission determined in the *Duncan's First Nation Inquiry 1928 Surrender Claim*:

> [I]t must be recognized that the words "interested in" are intended to ensure the participation of those band members who have a *reasonable connection* – whether residential, economic, or spiritual – with the reserve. What constitutes a reasonable

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218 John E. Hughes to Minister, Department of the Interior, 2 September 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

219 ICC Transcript, December 7, 2001 (ICC Exhibit 14a, pp. 17–18, Stewart Gordon Wasteste).

220 *Indian Act*, RSC 1906, s. 49(2).

> connection will clearly vary depending on the circumstances of a given case, and therefore it would not be wise or even necessary for us to attempt to enumerate all the criteria that might be considered to give rise to such a connection. Generally speaking, we would err on the side of inclusion, and we would observe that it is *only those individuals who have little or no connection with the reserve who should be excluded from voting on the surrender of reserve lands.*[221]

For all the same reasons that we found Bogaga habitually resident at Turtle Mountain reserve, we find that he was interested in the reserve. By this standard, Bogaga must have had a reasonable connection to the Turtle Mountain reserve in order to vote on its surrender. Given Bogaga's long-term residency at Turtle Mountain, his continued presence at and link to the reserve (as established by his ongoing attendance at Hdamani's house in surrender discussions), and the lack of protest by Hdamani at Bogaga's participation in the surrender vote, it is certain that Bogaga had a reasonable connection to the Turtle Mountain reserve.

We also find it worthwhile to mention that the improvements that Bogaga made to the reserve in the form of a house, a stable, and cultivated lands clearly demonstrate an interest in the Turtle Mountain reserve.[222] These undisputed facts place Bogaga in a category beyond "little or no connection with the reserve," and he was rightly included in the voting on the surrender of the reserve lands.[223]

Issue 2(b) Was the Band's Assent to the Surrender Properly Certified?
Were the requirements of the *Indian Act*, and in particular section 49(3) in terms of completion of the affidavit, properly complied with, i.e., was the assent by the Band certified on oath by some of the Chiefs or principal men present at the meeting and entitled to vote?

The primary issue between the parties is whether the certification by *one* principal man, Tetunkanopa, instead of *some* principal men, was in compliance with section 49(3) of the *Indian Act*, and, if not, whether non-compliance with this section invalidates the surrender.

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221 Indian Claims Commission, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000), 12 ICCP 55 at 165–66. Emphasis added.

222 J. Hollies, Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 384).

223 We will further address the question of "interested" members in our analysis of section 49 of the 1906 *Indian Act* later in this report.

Section 49(3) of the1906 *Indian Act,* RSC 1906, c. 81, reads as follows:

> 49(3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, *and by some of the chiefs or principal men present thereat and entitled to vote …*[224]

The surrender document and the affidavit are dated August 9, 1909. The surrender is signed by the marks of Bogaga, Tetunkanopa, and Charlie Tetunkanopa. It provides in part:

> THAT WE, the undersigned ["Chief and" struck out] Principal men of The Turtle Mountain Band of Indians resident on our Reserve No. 60, at Turtle Mountain in the Province of Manitoba and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up ... that certain parcel or tract of land and premises, situate lying and being in the Turtle Mountain Reserve, No. 60 in the Province of Manitoba containing by admeasurement six hundred and forty acres be the same more or less and being composed of the whole of the said Turtle Mountain Reserve No. 60.
>
> ...
>
> AND WE the said ["Chief and" struck out] Principal men of the said Turtle Mountain Band of Indians do on behalf of our people and for ourselves hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the sale of the said land and the disposition of the moneys arising therefrom.
>
> ...
>
> Signed Sealed and Delivered in the presence of
> (sgd) Charles Elvingston Stevens – Chief of Police
>
> (sgd) Bogaga his X Mark
> (Sgd) Tetunka-Nopa his X Mark
> (Sgd) Charlie Tetunka Nopa his X Mark[225]

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[224] *Indian Act*, RSC 1906, c. 81, s. 49(3). Emphasis added.

[225] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 375–81).

Attached to the surrender document is an affidavit dated August 9, 1909, sworn by J. Hollies and Tetunkanopa before T.K. Spence, JP, Deloraine, Manitoba.[226] One of the two signatories to the affidavit, Tetunkanopa, certified:

> That the annexed Release of Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.
>
> That such assent was given at a meeting of council of the said Band of Indians summoned for that purpose, according to its Rules, and held in the presence of Tetunkanopa.
>
> That no Indian was present or voted at such council or meeting who was not a habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.
>
> That he is ["a Chief" struck out] of the said Band of Indians and entitled to vote at the said meeting or council.
>
> SWORN before me by the Judicial Deponent and Judicial agent at the Village of Deloraine in the County of Brandon this 9th day of August A.D., 1909.
>
> (sgd) TK Spence JP
>
> ...
>
> (sgd) Tetunka-nopa his X mark

In the same document, the other signatory to the affidavit, Agent Hollies, also attested to a number of statements confirming the surrender's compliance with the provisions of the *Indian Act*.

Agent Hollies' report to the Secretary of Indian Affairs on August 12, 1909, illustrates that the arrangements for signing the surrender document and affidavit following the vote on August 6, 1909, were not without practical difficulties:

> Immediately afterwards, Bogaga, with Tetunka-nopa and his son Charlie, proceeded to Deloraine to sign Surrender papers, and Tetunka-nopa to make Affidavit as required with myself and as Bogaga is blind. But here at Deloraine, and within reasonable distance, was not to be found A competent person such as the Indian act requires before whom I with Tetunka-nopa, could certify on oath, that such

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[226] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 378).

> "Surrender" had been assented to by the band; and finally had to be deferred till the 9th, when I could secure a J. P. from Medora to visit Deloraine for that purpose.[227]

From this report, it is evident that Hollies, for one, did not question the propriety of having only one principal man, Tetunkanopa, sign the affidavit. In order to know whether Hollies complied fully with the statutory requirements, however, we shall first determine if the word "some" in section 49(3) can mean "one," to ascertain whether the certification by one principal man of the Turtle Mountain Band was sufficient to be in compliance with the *Indian Act*.

Canada's counsel submits that the terms of the Act were fulfilled by the affidavit sworn by Tetunkanopa. Canada refers to the definition in the *Concise Oxford English Dictionary*[228] of "some" as "an unspecified amount or number of" and argues that, if the language is construed on its plain meaning, "the singular is included in the definition of 'some.'"[229] Tetunkanopa is "some" of the principal men, according to Canada, and therefore the "directive for certification, on oath, by one or more of the chief or principal men of the band was fulfilled by the one affidavit sworn by Tetunkanopa on August 9, 1909."[230]

In contrast, the First Nation's position is that "the requirement that the certification be made 'by *some* of the Chiefs or principal men present thereat and entitled to vote' is not complied with by the certification of Tetunka-nopa alone."[231] In particular, the First Nation relies on the specific instructions given to Agent Hollies by Deputy Superintendent General Frank Pedley to support its argument that at least two principal men should have signed the affidavit:

> On September 3, 1908, Agent Hollies was instructed by Mr. Pedley to take a Surrender "under and in accordance with the provisions of the *Indian Act*", and, in

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227 J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–83).

228 *Concise Oxford English Dictionary*, 10th ed. (Oxford: Oxford University Press, 1999).

229 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 18.

230 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 18.

231 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 23.

> particular, he was to make an Affidavit of Execution along with "two of the principal men".[232]

We note, however, that the September 3, 1908, letter from Mr. Pedley was advice in anticipation of the proposed surrender and was not as strictly stated as his June 16, 1909, letter to Agent Hollies. This letter was instructive and directly related to an actual surrender, not a *proposed* one. Pedley's instructions to Hollies this time were as follows:

> I enclose forms of surrender, duly amended, as requested, which you are hereby authorized to submit to the Indians under and in accordance with the provisions of the Indian Act.[233]

In other words, the advice given nearly a year before the surrender meeting was not repeated in the instructions given two months before surrender. These latter instructions indicate only that the surrender be in compliance with the *Indian Act*.

Because of the lack of jurisprudence on the interpretation of the word "some" in section 49(3) of the *Indian Act*, we find it necessary to seek further guidance from both the facts surrounding the surrender vote and the case law that is relevant to understanding the objective of the certification requirements.

With respect to the facts:

- There is a strong evidentiary trail that points to the intentions of the voters having being accurately represented in the vote. The preliminary surrender discussions with the Band, as outlined in Hollies' reports of March 15 and April 28,1909, in particular the record of those favouring and those opposing surrender, are consistent with the report of the surrender meeting on August 6 and the surrender document of August 9.

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232 F. Pedley, Deputy Superintendent General of Indian Affairs, to J. Hollies, Acting Indian Agent, September 3, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 328), in Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 21.

233 F. Pedley, Deputy Superintendent General of Indian Affairs, to J. Hollies, Indian Agent, June 16, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 374).

- As stated by Canada's counsel, there was no subsequent dispute related to the vote,[234] nor was there a later dispute over the intentions of the voters or the certification by Tetunkanopa and Hollies.

- There were only five voting members of the band, three of whom (Bogaga, Tetunkanopa, and his son Charlie Tetunkanopa) voted in favour of the surrender. One out of the three voters assenting to the surrender signed the affidavit.

- Agent Hollies' report suggested that only Tetunkanopa was to sign the affidavit on behalf of the Band "as Bogaga is blind."[235]

We have no written evidence to establish why Tetunkanopa's son Charlie did not sign the affidavit. Hollies' report[236] is silent on the question of Charlie's eligibility. Canada suggests that the lack of Charlie's signature may be due to the fact that "the agent did not consider Charlie to be a 'principal man', since he was only 22 years old and his father was still alive."[237] The term "principal men" in section 49(3) of the *Indian Act* has not, to our knowledge, been defined in the jurisprudence, nor have the parties sought to make submissions on its meaning. We note, however, that Charlie Tetunkanopa was considered a principal man for the purpose of voting on the surrender, as evidenced by the wording of the document, "WE, the undersigned ['Chief and' struck out] Principal men." Moreover, section 49(1) of the *Indian Act* simply requires that voters on a surrender be male *band members* over the age of 21 years.[238] Finally, we note that there was no recorded concern voiced at the surrender meeting or subsequently that any of the voters was not a principal man. Without more guidance, we are able to infer that, at least for the purpose of a surrender vote, à male band member over 21 was considered a principal man. As such, Charlie Tetunkanopa, aged 22, was a

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234 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 18.

235 J. Hollies, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 382).

236 J. Hollies, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–84).

237 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 19.

238 *Indian Act*, RS 1906, s. 49(1).

principal man and could have signed the affidavit. That he did not, however, is in no way conclusive of the question as to whether the requirements of section 49(3) were met.

In addition to the facts, a number of cases and Commission inquiry reports provide further guidance in determining whether Agent Hollies complied with the Act in obtaining only one signature of a principal man on the affidavit.

In the context of a surrender, the Supreme Court of Canada in *Blueberry River Indian Band v. Canada*[239] (referred to as the *Apsassin* case throughout this report) specifically discussed the objective of the certification requirements. With respect to the true object of the 1927 *Indian Act* provisions (which correspond to section 49(3) of the 1906 Act), the Court stated:

> *The true object ... was to ensure that the surrender was validly assented to by the Band ... Moreover, to read the provisions as mandatory would work serious inconvenience*, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and then certifying the assent. I therefore agree with the conclusion of the courts below that the "shall" in the provisions should not be considered mandatory.[240]

Canada argues, and we agree, that this case stands for the proposition that substantial compliance with the technical requirements of the Act is sufficient to confirm a valid surrender "as long as the evidence clearly indicates the valid assent of the Band members."[241] Substantial compliance is further confirmed if the true intention of the band members can be assessed by review of their knowledge of the surrender and its consequences – in other words, that they were giving up forever their rights to the reserve land.[242]

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239 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

240 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 374–75 (SCC) McLachlin J. as quoted in the Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 20. Emphasis added.

241 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 20.

242 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

In the *Kahkewistahaw First Nation Inquiry 1907 Reserve Land Surrender Claim* Report,[243] the Commission reviewed the statement by Killeen J in *Chippewas of Kettle and Stony Point v. Canada*[244] to the effect that band consent to a surrender that would otherwise be valid cannot be nullified by an evidentiary proviso that provides sworn proof that the surrender provisions in section 49(1) and (2) were met. The Commission went on to state that section 49(3) merely confirms that what took place at the surrender vote complied with the stringent requirements of the *Indian Act*. Further, stated the Commission, if the results of a surrender vote could be struck down only because of a failure to follow exactly the technical requirements of certification in section 49(3), the object of the legislation – to ensure that the surrender was validly assented to by the Band – would be undermined.[245]

The caselaw is clear that section 49(3) is directory, not mandatory, and, as such, the failure to meet the requirement of the subsection would not nullify the result of a surrender vote that is otherwise valid. We have already found that Bogaga was habitually resident at Turtle Mountain reserve at the time of the surrender vote. Therefore, the validity of the surrender is confirmed on that basis. If, as we discuss below and as the First Nation argues, the Crown breached its fiduciary obligations by engaging in tainted dealings or otherwise, the validity of the surrender would be seriously in question. In this situation, if there were a failure to meet the technical requirements of the section 49(3) certification, the weight given to the affidavit as direct evidence of compliance with the surrender requirements would be greatly diminished, as the First Nation argues.[246]

Barring such a finding, however, the Commission is persuaded on the facts and the applicable law that Agent Hollies was in compliance with both the technical requirements and the objective of section 49(3). On balance, we find that "some" principal men can, by definition, mean "one"

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243 Indian Claims Commission, *Kahkewistahaw First Nation Inquiry 1907 Reserve Land Surrender Claim* (Ottawa, February 1997), reported (1998), 8 ICCP 3.

244 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 at 691–92, aff'd (1996) 31 OR (3d) 97 (CA).

245 Indian Claims Commission, *Kahkewistahaw First Nation Inquiry 1907 Reserve Land Surrender Claim* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 70.

246 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 27.

principal man. Both the plain meaning of the words of section 49(3) and the undisputed objective of the affidavit – to ensure a surrender validly assented to by the band – support this interpretation.

We are further persuaded that, even if other options were available, it was reasonable on the facts of this case for Agent Hollies to obtain only one signature. It could even be argued that "some" is little more than a question of fact to be determined by the circumstances of each case. Here, the Commission finds that "some" of the principal men included the possibility of "one," given the small number of principal men, the accordance of the vote with the previously stated intentions of the principal men, and Bogaga's blindness.

We wish to comment here on the First Nation's assertion that Bogaga's blindness was not a reasonable justification to excuse him from signing the affidavit.[247] The fact that Bogaga signed the surrender document in Deloraine on August 9, 1909, and not the affidavit on the same day, does not reasonably lead to the inference, as argued by the First Nation, that Bogaga did not do so because it "would require him to depose the facts which he knew to be false, namely the paragraph attesting to the fact 'that no Indian was present or voted at such Council or meeting, who was not a habitual resident on the Reserve of the said Band.'"[248] In the absence of any supporting evidence and given that we have already found that Bogaga was habitually resident on reserve, we do not find it necessary to address this argument.

With Bogaga's blindness considered by Hollies to be a problem, with Hdamani and Chaske ineligible to sign the affidavit, given the wording in the document ("That the annexed Release or Surrender was assented to by him"),[249] and with no information as to why Charlie Tetunkanopa did not sign, we find that, in these circumstances, the attestation requirement was fulfilled by having Tetunkanopa alone sign the affidavit.

The facts of this case require that we ensure that legislation which anticipated a larger number of voters does not have a negative impact on the relatively small number of voters present at this surrender meeting. In other words, process should have a minimum impact on substance. In

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247 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 23.

248 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 23.

249 Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1(ICC Documents, Exhibit 1, pp. 375–81).

this instance, there were three voters in favour of surrender and two against. It is significant that 60 per cent voted in favour, and, in this situation, one of the assenting voters (20 per cent) signed the affidavit. In the absence of additional information that would raise a serious question as to why only one signed the affidavit, the Commission concludes that the reasonable interpretation is the one that best reflects the will of the voters. In this instance, it seems reasonable and fair to have one voter sign the affidavit. If Agent Hollies made an error in assessing the capacity of one of the voters to sign an affidavit, that error belongs to process and not to the substance of the decision made by the voters.

Although not raised by either party, we note that the English version of section 49(3) situates the word "some" before the words "chiefs or principal men." In most surrender situations, there is only one chief, not some chiefs, and it would be illogical in this context to define "some" as "two or more." Furthermore, the French version of section 49(3) of the 1906 *Indian Act*, reads as follows:

> Le fait que la cession ou l'abandon a été consenti par la bande à ce conseil ou assemblée doit être attesté sous serment, par le surintendant général ou par le fonctionnaire autorisé par lui à assister à ce conseil ou assemblée, *et par l'un des chefs ou des anciens qui y a assisté et y a droit de vote ...*[250]
>
> [Translation
> 49(3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, *and by one of the chiefs or principal men present thereat and entitled to vote ...*[251]]

The use of the singular noun "l'un" and the singular verbs "a assisté" and "a droit" in the French version further supports the argument that the signature of one chief or one principal man on the affidavit is all that the Act requires.

In summary, the Commission is satisfied that the statutory requirement that the affidavit be signed by "some of the chiefs or principal men present thereat and entitled to vote" was met. As a question of statutory interpretation, we find that "some" can equal "one" and, in this case, it did.

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250 Loi des sauvages, SRC 1906, c. 81, par. 49(3). Emphasis added.

251 This is not the official English version, which can be found on page 63; the words underlined are a literal translation of words used in the French version of the 1906 *Indian Act*. Emphasis added.

Furthermore, in the appropriate circumstances, as here, it was both reasonable and consistent with the caselaw to have only one principal man attesting to the validity of the Band's assent to the surrender. To find otherwise on these facts would be to undermine the will and the autonomy of the majority of the voters.

Issue 2(c) Is the Surrender Invalid?

If the Band's Assent to the Surrender Was Not Properly Certified, Is the Surrender Invalid?

The Commission has found that the surrender of reserve lands by the Turtle Mountain Band of Indians on August 6, 1909, accorded with the provisions of the *Indian Act* of 1906. It is therefore unnecessary to answer this question.

Issues 3–5 Does Canada Have an Outstanding Lawful Obligation to the First Nation?

What duties and obligations, fiduciary or otherwise, if any, did Canada owe to the Band in relation to the interests of the Band and its members in the taking of reserve lands by way of surrender?

Did Canada fail to fulfil any of the said duties or obligations to which it was subject?

If Canada failed to fulfill any of such duties or obligations, is said conduct by Canada sufficient to render void the Surrender of 1909 or to result in Canada's having an outstanding lawful obligation to the First Nation in respect of the taking of reserve lands?

Our mandate under the Specific Claims Policy is to determine whether an outstanding lawful obligation is owed by Canada to the Canupawakpa Dakota First Nation. Although we have concluded that the surrender was taken in accordance with the procedures set out in the 1906 *Indian Act*, an outstanding lawful obligation may nevertheless be grounded in Canada's breach of its fiduciary duties to the First Nation. We now turn to our analysis of the fiduciary duties, if any, owed by Canada to the Canupawakpa Dakota First Nation on the facts of this case.

We begin with a review of the Supreme Court of Canada's decisions in *Guerin v. The Queen*[252] and in *Apsassin [Blueberry River Indian Band v. Canada]*.[253]

The *Guerin* Case

In *Guerin*, the Supreme Court of Canada dealt with the Musqueam Band's 1957 surrender of 162 acres of its reserve land to the Crown. This land was surrendered for the purpose of leasing the land to the Shaughnessy Golf Club, on the understanding that the lease would contain the terms and conditions presented to and accepted by the Band Council. The surrender document required the Crown to lease the land on such terms as it deemed most conducive to the welfare of the Band. Subsequently, however, the Band discovered that the lease did not give effect to the understanding reached between the Band Council and the Crown. In fact, the terms were much less favourable to the Band than as agreed.

All eight members of the Court found that the Crown owed a legal duty to the Band in relation to the surrender and that this duty had been breached. However, three sets of reasons for judgment were rendered, disclosing different conceptions of the nature of this duty. On behalf of the majority of the Court, Dickson J (as he then was) wrote:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act
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> ...
>
> [W]here by statute, agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[254]

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252 *Guerin v. The Queen*, [1984] 2 SCR 335.

253 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

254 *Guerin v. The Queen*, [1984] 2 SCR 335 at 383–84.

Dickson J noted that "[t]he discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case.... The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2)."[255] As we said in the *Moosomin First Nation 1909 Reserve Land Surrender Inquiry* Report during a similar review of the *Guerin* case, "fiduciary principles will always bear on the relationship between the Crown and Indians, but, depending on the context, a fiduciary duty may be narrowed because the Crown's discretion is lesser and a First Nation's scope for making its own free and informed decisions is greater."[256]

In the *Moosomin* Inquiry, as here, section 49(1) of the 1906 *Indian Act* is an example of such narrowing: although reserve land is held by the Crown on behalf of a band, it may not be surrendered except with the band's consent. It is this "autonomy" to decide how to deal with reserve land that the Supreme Court of Canada considered in *Apsassin*, an issue to which we now turn.

The *Apsassin* Case

In *Apsassin*, the Court considered the surrender of reserve land by the Beaver Indian Band, which later split into two bands now known as the Blueberry River Band and the Doig River Band. The reserve contained good agricultural land, but the Band did not use it for farming. It was used only as a summer campground, since the Band made a living from trapping and hunting farther north during the winter. In 1940, the Band surrendered the mineral rights in its reserve to the Crown, in trust, to lease for the Band's benefit. In 1945, the Band was approached again, to explore the surrender of the reserve to make the land available for returning veterans of World War II interested in taking up agriculture.

After a period of negotiations between the Department of Indian Affairs (DIA) and the Director, Veterans Land Act (DVLA), the entire reserve was surrendered in 1945 for $70,000. In 1950, some of the money from the sale was used by the DIA to purchase other reserve lands closer to the Band's traplines farther north. After the land was sold to veterans, it was discovered that it contained valuable oil and gas deposits. The mineral rights were considered to have been

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255 *Guerin v. The Queen*, [1984] 2 SCR 335 at 387.

256 Indian Claims Commission, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998), 8 ICCP 101 at 180.

"inadvertently" conveyed to the veterans, instead of being retained for the benefit of the Band. Although the DIA had powers under section 64 of the *Indian Act* to cancel the transfer and reacquire the mineral rights, it did not do so. On discovery of these events, the Band sued for breach of fiduciary duty, claiming damages from the Crown for allowing the Band to make an improvident surrender of the reserve and for disposing of the land "undervalue."

In several of its previous inquiries involving allegedly wrongful surrenders and, most recently, in the *Duncan's First Nation* claim,[257] the Commission has conducted an extensive examination of the *Apsassin* decision. Although this analysis will not be repeated in detail, it is useful to restate that the Court in *Apsassin* not only confirmed that Canada must conduct itself according to the high standards required of a fiduciary in its dealings with a band before the taking of a surrender but also set out the principles by which it should be determined whether that duty has been met. As we have stated in previous reports, the Court's comments on the question of pre-surrender fiduciary obligations may be divided into those touching on the *context* of the surrender and those concerning the substantive *result* of the surrender. The former obligation concerns whether the context and process involved in obtaining the surrender allowed the Band to consent properly to a surrender under section 49(1) of the *Indian Act* and whether its understanding of the dealings was adequate. In the following analysis, we shall first address whether the Band effectively ceded or abnegated its autonomy and decision-making power to or in favour of the Crown. We shall then consider whether the Crown's dealings with the Band were "tainted" and, if so, whether the Band's understanding and consent were affected.

The substantive aspects of the Supreme Court of Canada's comments relate to whether, given the facts and results of the surrender itself, the Governor in Council ought to have withheld its consent to the surrender because the transaction was foolish, improvident, or otherwise exploitative. In their written submissions, counsel for Canada and counsel for the Canupawakpa Dakota First Nation framed their arguments regarding Canada's fiduciary duties, if any, around either the *context* of the surrender, as the First Nation argues, and/or around the substantive *result* of the surrender, as Canada argues. We shall address each in turn.

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[257] Indian Claims Commission, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000), 12 ICCP 53.

The Context of the Surrender: Inadequate Understanding

In his judgment for the majority in *Apsassin*, Justice Gonthier wrote that he would have been "reluctant to give effect to this surrender variation if [he] thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."[258]

In Canada's response to the Canupawakpa Dakota First Nation's written submission, it admits of certain duties in the process of taking a surrender. First, Canada acknowledges a duty to ensure statutory compliance. As we have previously addressed the issue of statutory compliance, it will not be necessary to repeat this analysis except to restate that, since the statutory provisions of the *Indian Act* give the band the power to decide for or against a surrender, the band's decision must be respected unless the conduct of the Crown has made it unsafe to rely on that decision. Instead, we shall consider Canada's second admitted duty – namely, to ensure that the Band's decision to surrender land is an informed one. Canada submits that there are a number of factors which are relevant to determining whether the consent was based on adequate information. These factors include "whether the voters had discussed the matter fully, both at the [surrender] meeting and amongst themselves, whether they understood the consequences of the transaction even though they might not have fully understood the precise legal nature of the interest they were surrendering, and the conduct of departmental representatives."[259]

Canada submits that the Band had ample opportunity to make an informed and considered decision. Beginning in the 1870s and before a reserve was surveyed at Turtle Mountain, the Crown expressed a desire for the Turtle Mountain Band to settle on other Sioux reserves. Soon after the Department of Indian Affairs had decided to allow the Turtle Mountain Band to remain "during good behaviour" at Turtle Mountain, the question of surrender and transfer to other bands was raised. After 1889, Agent Markle pursued this goal until he left the agency in 1898. Following a period of relative inactivity over the matter of surrender, Agent Hollies again brought the issue to the Band in 1908. At that time, he reported that both Hdamani and Bogaga were opposed to surrender. Hollies

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258 *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344 at 362 (SCC), Gonthier J.

259 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 25

again brought the matter of surrender forward in March and April of 1909. The surrender itself was not taken until August 1909. In Canada's view, the cumulative effect of each successive attempt to seek a surrender resulting in repeated refusals can only mean that the Band "had a significant period of time and opportunity to consider the issue of surrender and to obtain information regarding the consequences."[260]

Canada also cites Hollies' reports of March 15, 1909, and April 28, 1909, as clear authority that the consequences of surrender were explained to the voters of the Turtle Mountain Band. Further, Hollies' notes in his April 28, 1909, report and his notes of the surrender meeting itself indicate that, at a minimum, an interpreter was present. The proof that the voters understood that the land was to be sold and that they would receive the proceeds of sale is evidenced, in Canada's view, by at least one voter, Bogaga, and his February 1910 request for an advance on his share of the proceeds.[261]

The Band, says Canada, understood that it would no longer have any right to live at Turtle Mountain after the surrender, since the issue of the necessity to transfer to other reserves after the surrender was a significant part of Hollies' discussion with the elder voters. Further, they knew from discussions with Hollies and from the terms of the surrender document itself[262] that they would receive proceeds of sale, including compensation for their improvements.

Although it is clear that some aspects of the Band's understanding are not directly in evidence, Canada argues that, taken together, all these circumstances would have ensured that the Band's decision was made without haste, with full opportunity to discuss it among themselves and with the Indian Agent, and with an adequate understanding of the consequences of the surrender. In the result, the consent was valid.[263]

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260 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 21.

261 J. Hollies, Indian Agent, to the Secretary, Department of Indian Affairs, February 7, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC documents, Exhibit 1, p. 402).

262 Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1(ICC Documents, Exhibit 1, pp. 375–81).

263 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 22.

The First Nation does not address the Turtle Mountain Band's understanding of the terms of surrender in any detail in either its written submission or in argument, except to state that the "surrender" purportedly taken by Canada "really did not evidence the intent and free consent of the First Nation."[264] We have taken this to mean that the "intent and free consent" of the Band is evidenced, according to the First Nation, by its repeated refusals to leave the reserve during Agent Markle's time in the 1890s and by its refusal to surrender when the plan was first presented by Agent Hollies in 1908, but not by its final decision on August 6, 1909.

We also find it curious that the First Nation, in its submission, addresses the result of the 1909 surrender on the Band when it states that "the result would be not only the release by the Band of all its reserve lands but, in effect, the loss of the Band's identity,"[265] but it does not develop this argument by reference to the evidence or lack thereof. Nor is it clear whether the First Nation considers that a failure on the part of the Crown to explain to the Band that a surrender of the reserve would result in a loss of the Band's identity would constitute a breach of the Crown's fiduciary obligations.

Nevertheless, having reviewed the parties' different approaches to the Band's understanding of the terms of surrender, we agree with Canada's characterization of this issue – that the most critical question the Commission must ask itself in consideration of this claim is "whether there is anything in this record that leads [it] to conclude, on balance, that the consent was less than informed and voluntary?"[266] We shall address the voluntariness of the Band's consent to surrender later in this report when we consider "tainted dealings." At this point we shall summarize the information and understanding of the Band with regard to the surrender.

Based on the written record, we know that Agent Hollies reported in November 1908 that "the feeling and talk [among the Turtle Mountain membership] has been strongly against the

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264 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 65. In fact, the First Nation offered no written reply.

265 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 88.

266 ICC Transcript, October 22, 2002, and November 15, 2002, p. 138 (Uzma Ihsanullah).

surrender of the Reserve."[267] By March of the following year, Hollies met again with the three remaining senior members of the Band: "[E]ach man is over 65 years, and incapable of farming any of the 640 acres, and all three are on the ration list."[268] By April 1909, Hollies met again with the members of Turtle Mountain and reported that "it was the question of How they were going to cultivate lands this year, and the knowledge of their incapacity and feeling of helplessness, that brought the question of surrender of the reserve, so strongly to their attention, and finally after many hours to their adoption."[269] We also know that it was another five months, in August 1909, before Hollies reassembled the members for a vote. We can only assume that, within this five-month period, there would have been further discussion regarding the matter of surrender. According to the actual surrender document, what would have been understood by the members at the time of the August 6, 1909, vote was that they were giving up all rights to the Turtle Mountain IR 60 and would be entitled to a share in the surrender proceeds. We also know that an interpreter was present that day, and we can assume that he would have translated the terms of the surrender agreement. Moreover, we know that Agent Hollies was anxious for the members to relocate to other Sioux reserves, even though the surrender document is silent as to their relocation.

Based on the totality of the evidence, we are satisfied that the remaining members of the Turtle Mountain Band who voted on August 6, 1909, understood that they were forever giving up their rights to IR 60, that they would have to relocate, and that they would receive the benefit of the sale of these lands. Their understanding of these terms was adequate. Canada has demonstrated that it conducted itself with the required diligence, and we therefore do not find Canada to be in breach of this fiduciary duty.

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[267] J. Hollies, Acting Indian Agent, to the Secretary, Department of Indian Affairs, November 20, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 339).

[268] J. Hollies, Acting Indian Agent, to D. Laird, Indian Commissioner, March 15, 1909, NA, RG 10, vol. 3569, file 95-2A (ICC Documents, Exhibit 1, p. 359).

[269] J. Hollies, Acting Indian Agent, to D. Laird, Indian Commissioner, March 15, 1909, NA, RG 10, vol. 3569, file 95-2A (ICC Documents, Exhibit 1, p. 368).

Abnegation of Decision-Making Power

The First Nation referred the Commission panel to the Commission's decision in *Kahkewistahaw* and its analysis of McLachlin J's reasons in *Apsassin* concerning the Crown's fiduciary obligations in the pre-surrender context – in particular, the portion of the report that dealt with circumstances where a band's decision-making authority may be ceded or abnegated. In *Kahkewistahaw*, the Commission said:

> We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to have been ceded or abnegated. The mere fact that the band had technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown. Unless the upshot of Justice McLachlin's analysis is that the power to make a decision is ceded or abnegated only when a band has completely relinquished that power in form as well as in substance, we do not consider the fact of a band's majority vote in favour of a surrender as being determinative of whether a cession or abnegation has occurred.[270]

In this case, the First Nation argues that, by August 6, 1909, Canada's depopulation of the Turtle Mountain reserve had resulted in reducing the effective voting members to three. One of the members, Bogaga, "the swing vote," was a blind, destitute person "under the care and influence of the Indian Agent Hollies." In addition, the First Nation argues, Hollies had such absolute control over the timing and location of the surrender vote that he could guarantee a positive vote. From his original instructions to seek a surrender on March 23, 1908, Hollies had, "on every opportunity where a surrender vote would have been unsuccessful, refused to implement those instructions, choosing to await an opportunity where success was guaranteed." In such circumstances, the First Nation argues, the Band lacked the capacity to exercise its autonomy or to exert any measure of control over the surrender process. The voting members were, in effect, "pawns under the control of Indian Agent Hollies." In this way, the First Nation submits, the Turtle Mountain Band abnegated

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270 Indian Claims Commission, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 87.

its decision-making authority to the Crown in the person of Agent Hollies and, in these circumstances, the Crown "must be burdened with a fiduciary obligation to act conscientiously and in the best interests of the Band."[271] Its failure to meet its fiduciary duty and act "conscientiously" should therefore result in a finding that the surrender is invalid.

In response, Canada submits that a surrender is not invalid simply because it is one that the Crown favours, provided that the assent of the band is obtained in accordance with the law. In this case, the Department of Indian Affairs had, quite openly and for valid reasons, long wanted a surrender of Turtle Mountain IR 60. However, Canada submits, the department equally acknowledged that the decision to surrender lay with the Band.[272] Further, the Crown's concerns about Turtle Mountain had existed for over 50 years before the surrender and were made known to the Band. Canada's "legitimate policy and operational concerns" included the proximity of the reserve to the international border and the distance of the reserve from the Agency, a distance that made the delivery of services "inconvenient." Nevertheless, Canada argues that, despite the determination of the two key Indian Agents, Markle and later Hollies, both were instructed to use only acceptable methods of persuasion. Further, Canada submits, Markle's more aggressive tactics were not sanctioned by the department's senior officials, and he was immediately instructed to desist once his strategy became known.

As regards the relocation of members to other bands, Canada submits there is no evidence indicating that Markle's failure to give assistance in 1891 (some 18 years before the surrender vote) actually forced anyone to leave the Turtle Mountain reserve. When, later that spring, three families moved to Oak Lake, Markle did not initiate the transfer but merely facilitated it once he became aware of the families' willingness to relocate. In any case, Canada submits, the relocations occurred with the consent of the families involved and the band to which they moved.

As no action was taken regarding the proposed surrender from the time of Agent Markle's departure in 1898 to Agent Hollies' arrival in 1908, Canada submits, it is entirely unsupportable to suggest that departmental officials conducted a "relentless twenty-year campaign to obtain a

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271 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, pp. 87–88.

272 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 26.

surrender of Turtle Mountain."[273] Finally, Canada argues there is no evidence that Hollies used any means that were not legitimate in the period from his November 1908 report to the March 1909 meeting at which Bogaga and Tetunkanopa decided to surrender the reserve. Rather, Hollies' strategy seems to have been to wait patiently and use the power of persuasion when appropriate: "[H]e had well in mind the ultimate government requirement which was consent of the band."[274] In Canada's view, Hollies was confident that the band members would eventually change their minds – including Hdamani, once he had received the advice of the Indian Commissioner.

We are in agreement with Canada that there is no evidence to support the assertion that the Turtle Mountain Band abnegated its decision-making authority to Indian Agent Hollies. Even Hdamani, who said at one point that he would follow the advice of the Indian Commissioner, chose ultimately to do the opposite, and his decision was respected in the final result.

We are nonetheless mindful that the First Nation has also focused its argument on the context of surrender and of "tainted dealings" in order to argue that any expression of consent by the Turtle Mountain Band was vitiated by the conduct of the Crown. We shall now turn to this element of *Apsassin*.

Tainted Dealings and/or an Exploitative Bargain

On the one hand, the First Nation has focused its analysis of *Apsassin* and the facts of this case on Gonthier J's reasons that he would be "reluctant to give effect to a surrender if the conduct of the Crown had somehow tainted the dealings in a manner that made it unsafe to rely on the Band's understanding and intention."[275] Canada, on the other hand, has chosen to focus its analysis on McLachlin J's reasons in *Apsassin*, as discussed previously in this report, that the provisions of the *Indian Act* and the nature of the relationship between Canada and the Indians give rise to a fiduciary duty on the Crown, and more specifically the Governor in Council, to withhold its consent to a

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273 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 30.

274 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 32.

275 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 362.

surrender where the band's decision to surrender was, to use the words of McLachlin J, "foolish or improvident – a decision that constituted exploitation."[276]

As we have said in previous reports, at the heart of Justice Gonthier's reasons is the notion that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[277] Justice Gonthier emphasized the fact that the Band had considerable autonomy in deciding whether to surrender its land, and that, in making its decision, it had been provided with all the information it needed concerning the nature and consequences of the surrender. Accordingly, a band's decision to surrender its land should be allowed to stand unless its understanding of the terms was inadequate or there were tainted dealings involving the Crown which make it unsafe to rely on the band's decision as an expression of its true understanding and intention.

In its submissions, Canada acknowledges a fiduciary duty to refuse the surrender if the [Turtle Mountain] Band's decision was so foolish and improvident as to amount to exploitation. It is, as Canada says, a duty "unique to the context of the surrender of reserve land."[278] In its submissions, Canada states that in considering the question of whether the Band's decision amounted to exploitation, the decision should be viewed from the perspective of the Band at the time. In particular, Canada draws attention to the following circumstances:

- While no fixed price could be determined before the surrender, the Band could expect to receive the best price that could be had for the land.
- The surrender was in the interests of the remaining band members. Three of the remaining male members were elderly and could no longer farm the land. They could benefit from the proceeds of sale because they had no other sources of income or even sustenance, such as hunting and fishing.

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276 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 371.

277 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 358, as cited in Indian Claims Commission, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998), 8 ICCP 101 at 183.

278 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 22.

- Because the reserve was some distance from the Agency, regular advice or assistance from the Indian Agent was lacking.
- Hdamani kept the best land for his own use, and it is unclear whether the younger members of the Band were allotted land for their own purposes.
- The proceeds of sale would be helpful in establishing the two younger male members of the Band and their families.
- The population of the reserve was diminished owing to the transfers to other reserves, and the Turtle Mountain reserve was no longer viewed by most members as desirable to live on (because, for instance, of the scarcity of natural resources).
- Both Bogaga and Tetunkanopa were concerned that if they did not agree to a surrender, Hdamani would somehow dispossess them of their interest in the reserve.

Taken together, Canada submits that, in these circumstances, there was no duty on Canada to refuse the surrender. Rather, Canada had legitimate reasons for pursuing the surrender; the methods used were lawful and beneficial to those concerned; and it was persuasion and the reality of their own circumstances which lead the majority of band members to the decision to surrender.[279]

In contrast, the First Nation asserts that Canada's use of its position of authority to influence unduly and orchestrate a taking of reserve lands by "surrender," whether applied at the departmental or at the Indian agent's level, constitutes "tainted dealings involving the Crown" which undermined the Band's decision-making autonomy. Specifically, the actions of the Crown have "an odour of moral failure about them."[280] The First Nation points to the "campaign" by departmental officials to close the reserve beginning in 1889, together with Indian Agent Markle's withholding of aid and rations as the means of inducing band members to accede to a departmental policy that wanted their removal from Turtle Mountain. Further, monetary inducements were offered in 1898 by Agent Markle for two families to relocate from Turtle Mountain to the Oak Lake Sioux Band. In fact, three families relocated to Oak Lake reserve. Two of the families received $40 each towards construction

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279 Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 26.

280 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 31.

of new dwellings, and a third, Kibana Hota, moved in the expectation that the department would also supply him with lumber to a value of $40 to build a house at Oak Lake.[281]

The First Nation further points in evidence to the department's "authorized use of threats" to Chief Hdamani, in addition to the persuasion, coercion by withholding of rations, and financial inducements offered by the department in its attempts to remove the Band from its reserve. Specifically, the First Nation points to Secretary McLean's June 23, 1898, letter to Agent Markle in which the Secretary impresses on the Indian Agent that "it might perhaps have some effect upon Chief Hadamani to threaten him with deposition, if his position as Chief has been in any way recognized."[282] While there is no evidence, as the First Nation correctly points out, to indicate that this threat was actually carried out, it is significant, in its view, that it was suggested and authorized. The First Nation admits, however, that subsequent to 1898, there do not appear to be any further documented actions taken by Agent Markle towards closure of the reserve. When Agent Hollies took over the position of Indian Agent in 1908, he proceeded to set forward his "plan" to achieve a closing of the reserve.

The First Nation characterizes Agent Hollies' actions as "zealous" in pursuing the department's policy of depopulating the reserve in order to have it "surrendered" for sale. Further, by 1909, the timing and the outcome of the surrender vote were totally within the control of Agent Hollies, according to the First Nation; as long as Bogaga was under Agent Hollies' "care and influence," he could be brought to a meeting to cast the deciding vote between Tetunkanopa, whom Hollies would also need to arrange to be present, and Chief Hdamani.[283]

In the First Nation's view, by the time of the actual surrender vote, the department had engaged in 20 years of "systematic depopulation" of the Turtle Mountain community, which had left the one man capable of casting the deciding vote "completely dependent upon Agent Hollies who

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281 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, pp. 44–45.

282 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 48, citing J.D. McLean, Secretary, Department of Indian Affairs, to J.A. Markle, Indian Agent, June 23, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 251).

283 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 61.

obsessively wanted to obtain the 'surrender.'"[284] The First Nation argues that the power and influence of the Indian Agent over the Turtle Mountain Band was elevated because, in the mind of departmental officials, there were no treaty obligations and "anything done for [the Sioux] is a matter of grace and not of right."[285] The First Nation referred to a considerable amount of community evidence to exemplify the image of the Indian agent which had grown in the minds of the current residents of the Oak Lake and Oak River Bands. The agents were variously referred to as "the judge, he is the police, he is everything";[286] "the most important person that came from Indian Affairs to work in the communities";[287] "a tyrant, he was a crook."[288] Although it was clear to the Commission that the generation of elders we heard from would likely have been speaking about Indian agents in more recent years than during the time of Markle and Hollies, it was nevertheless clear that the relationship between the First Nation and the Indian agents was not one of mutual respect.

We have already said, and the record is clear, that the Crown wanted a surrender from the beginning of its relationship with the group. But Canada's motivation for a surrender is not enough. We agree with Canada's counsel that there must also be a "consideration about what the interests of the bands are."[289] Indian Agent Hollies' correspondence with Indian Commissioner Laird in January 1908 provides much insight into the thinking of the department about the problems on the reserve: because of its location (a distance of some 100 miles from the Agency), the reserve was subject to the influx of American Indians; there existed at least a perception of lawlessness and drunkenness; the reserve lacked a school, police, and a missionary; and the best arable lands were kept by Chief Hdamani. The department took all these factors into consideration in assessing the best interests of the Band. We also know from the community evidence that the Turtle Mountain

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284 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 64.

285 Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 69, citing Hayter Reed, Indian Commissioner, Department of Indian Affairs, to Thomas M. Daly, Minister, Department of the Interior, April 21, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, pp. 139–40).

286 ICC Transcript, December 7, 2001 (Exhibit 14a, p. 79, Stewart Gordon Westaste).

287 ICC Transcript, December 7, 2001 (Exhibit 14a, p. 38, Eva McKay).

288 ICC Transcript, December 7, 2001 (Exhibit 14a, p. 40, Eva McKay).

289 ICC Transcript, October 22, 2002, and November 15, 2002, p. 139.

residents were living with the threat of smallpox, and that some female members feared abuse by local settlers. The elders spoke plainly about the use of fire to chase away game from Turtle Mountain and the pressure to move from an area too close to the international border.[290]

The department planned on relocating the band members to other Sioux reserves that had sufficient land available. There they would receive some of the proceeds of the sale of the reserve, money that would enable them to re-establish themselves in their new locations. The remaining Turtle Mountain band members were aware that their personal circumstances favoured a relocation to other bands, and they knew they would receive a share of the proceeds of sale. Finally, four months had elapsed from Agent Hollies' first meeting with Hdamani and Bogaga in April 1909 to the actual vote in August 1909, and over a year from the time when Hollies first formally introduced the prospect of surrender in 1908. The Band had adequate time to consider its best interests.

We think it important to observe that there is no evidence to suggest that the option of not surrendering the land was ever presented to the Band, even though the Band repeatedly expressed an intention to retain the reserve and Hdmani and his son ultimately voted to keep it. Nevertheless, there is evidence that the department wanted Agent Hollies to plan for the future of the remaining members of the Band. He knew by November 1908 that three of the eligible voters were elderly and could no longer support themselves independently on the reserve. Their feelings of helplessness, we believe, ultimately convinced Bogaga and Tetunkanopa that a surrender was in their interest. It can also be inferred that these members understood they would be cared for as residents of these reserves, since the lack of services at Turtle Mountain was the single most repeated factor in Agent Hollies' discussion with the members regarding surrender. The surrender document itself speaks to the future of the members – that they were to receive a share of the proceeds sufficient to "give the Indians a start in their new homes, and also sufficient to compensate the owners of the improvements situate on the land [at IR 60]."[291] We also know that the Oak Lake Band received a share of the surrender proceeds in trust some 47 years after the fact.

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[290] ICC Transcript, December 7, 2001 (Exhibit 14A, pp. 63–67, 95, Kevin Tacan; p. 18, Stewart Wasteste; p. 210, Rosie Eastman).

[291] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 376 and 380).

On balance, we find that the Crown, as fiduciary, had a duty to ensure that, while patient in its pursuit and persuasive in its approach, the consequences of surrender were not exploitative and were in the best interests of the Band. In this case, the Crown had the obligation of ensuring that this band of Sioux, who first arrived in Canada as "refugees" and who ultimately came under the control of the department first "out of grace, not as of right" and then as beneficiaries of the Crown's fiduciary responsibilities, were prevented from entering into an exploitative bargain.

In our view, the evidence amply demonstrates that the Department of Indian Affairs saw the Band's intention to remain on Turtle Mountain IR 60 as an obstacle to be overcome. The Crown has a duty to honour and respect a band's decisions not only at the moment of surrender but at all points leading up to it. Consequently, its officials must refrain from engaging in "tainted dealings" that improperly influence the band at all times before the surrender vote.

The only documentary evidence in the record regarding the withholding of rations occurs some 18 years before the actual vote, and there is no evidence that this situation had any influence on any of the members. There were no transfers of members following Agent Markle's tactics, and there was no talk of surrender at this time within the community. As for other inducements, such as the offering of money to members in 1898 by Agent Markle, two families were given $40 each to build a new home. The third member, Kibana Hota, did not receive any money before relocating. Instead, the record indicates that the department was loath to create any expectation that it would provide assistance to all members who wanted to move away from Turtle Mountain. As Canada points out, the department was not "so intent upon obtaining a surrender as to provide inducements to those members who were not deemed needy."[292]

As for the threat to depose Chief Hdamani as "Chief," we agree with Canada's interpretation of the document as it relates to the continual threat of trespassers. Again, Agent Markle was reporting on the situation existing at Turtle Mountain in June 1898 – specifically, that Chief Hdamani was encouraging trespassers. Agent Markle was not writing in relation to the issue of surrender. Nonetheless, there is no evidence to suggest that this threat, if in fact it was communicated to Chief Hdamani, was ever implemented.

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[292] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 22.

Finally, we are not satisfied that the department carried out a "systemic depopulation" of IR 60. What we see from the evidence is the relocation of three families in 1898 during Agent Markle's time at the Agency, and another relocation of four families and a fifth male member during Agent Hollies' time at the Agency in 1908. There are no other known relocations during the intervening years leading up to the surrender. In each case, the department informed both Agent Markle and Agent Hollies that they needed "formal consent of the Band to which it is proposed to transfer any of these Indians, and also to get a written renunciation of the Indians removed to all title, claim or interest in the Reserve at Turtle Mountain."[293] We see from the evidence that the consents to transfer were executed in 1908. We have no evidence of the formal transfer of the members in 1898, yet each family received a share of the proceeds of sale following the surrender of IR 60. In our view, while the department made known its desire to relocate as many members of IR 60 as possible, it is also in evidence that it was prepared to accede to the wishes of as many members as were prepared to leave voluntarily. And while the decision to move may have been motivated by factors that the department was primarily in control of – namely, the provision of a school, a mission, supplies, and police – the decision to move was their own.

In conclusion, we cannot find, based on the totality of the evidence, that the department engaged in an unrelenting campaign amounting to tainted dealings. We find that the events leading up to the surrender at all times involved the consent of the individual members, both in their relocation and in their ultimate decision to surrender. We would be loath to undo the autonomy of the Band and its members to determine their future. Similarly, we find that, on balance, the decision of the Band, once given expression on August 6, 1909, was not exploitative, such that Canada would have been under to a duty to prevent its acceptance. Canada has therefore fulfilled its obligation in this regard.

Fairness in the Result: Our Supplementary Mandate

The Commission has, since its inception, understood that it has a responsibility to the Governor in Council, described as a "supplementary mandate," to draw to the government's attention any

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[293] J.D. McLean, Secretary, to A.E. Forget, Indian Commissioner, March 22, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 237).

circumstances where we consider the outcome to be unfair, even though those circumstances do not, strictly speaking, give rise to an outstanding lawful obligation. This is such a case.

The supplementary mandate of the Commission was first described in 1991 by then Minister of Indian Affairs Tom Siddon, in the following terms:

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendation on how to proceed.[294]

Morever, in a 1993 letter to the Commission, the Minister of Indian Affairs, Pauline Browes, reiterated the position taken by her predecessor. Minister Browes's letter makes two key points in relation to the Commission's jurisdiction:

> (1) I expect to accept the Commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the commission's recommendations on how to proceed in cases where the commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair.[295]

The Commission has exercised this authority sparingly and only in unusual circumstances which give rise to a demonstrable inequity or unfairness that we feel should be drawn to the attention of the Government of Canada.

The Commission relies on its supplementary mandate in this case because the "outstanding lawful obligation" test, defined in the Specific Claims Policy, will not bring this historical grievance to a close in one fundamental way. Indeed, it seems to us that the claim put forward by the Canupawakpa Dakota First Nation has less to do with monetary compensation than it does with the recognition of the connection between these Sioux people and Turtle Mountain IR 60.

In 1898, the widow Kasto requested that the department reserve "two small pieces of land in which their friends are buried and which it is their intention [illegible word] with a post and wire

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[294] Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991, reproduced in (1995), 3 ICCP 244.

[295] Pauline Browes, Minister of Indian Affairs and Northern Development, to Harry S. LaForme, Chief Commissioner, Indian Claims Commission, October 13, 1993, reproduced in (1995), 3 ICCP 242.

fence."[296] The Indian Department approved of widow Kasto's request in June 1898, saying, "[T]he wishes of the Indians with regard to the burial plots referred to will, of course, be respected should the reserve be sold."[297] We can find no evidence that this wish was in fact respected. On the contrary, Elder Philip HiEagle spoke to the Commission about looking for the gravesites at Turtle Mountain, knowing that there are members buried at the reserve, but being unable to locate these sites today because they were never preserved.[298]

As we have said in the past, circumstances often arise in the context of aboriginal land claims where it is possible to resolve a historical grievance and, simultaneously, create a great deal of good will with a minor investment of money. In pursuit of a just solution, and one that recognizes the deep spiritual connection these Dakota Sioux people have to this land, we believe that the Government of Canada should work with the Dakota Sioux people to acquire and properly designate the lands where the ancestors of the Turtle Mountain Band are buried. In our view, this designation can be done economically and in a manner that is respectful of all stakeholders who occupy, use, and enjoy the 640 acres that once made up IR 60. The Government of Canada does not have a legal obligation to undertake such a project, but in our view it would be the equitable and moral thing to do.

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[296] J.A. Markle, Indian Agent, to Indian Commissioner, May 24, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 242–43).

[297] Indian Commissioner to the Indian Agent, Birtle Agency, June 8, 1898, NA RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 247).

[298] ICC Transcript, January 17, 2002 (Exhibit 14b, p. 214, Philip HiEagle).

PART V

CONCLUSION AND RECOMMENDATION

We have concluded that the *de facto* reserve Turtle Mountain IR 60 was validly surrendered in accordance with the provisions of the *Indian Act* and that Canada, as fiduciary in taking this surrender, conducted itself as a reasonable and prudent trustee. We nevertheless recommend, pursuant to our supplementary mandate, that the Government of Canada recognize the historical connection of the descendants of the Turtle Mountain Band to the lands once occupied by Turtle Mountain IR 60 and, in particular, the lands taken up by the burial of their ancestors.

RECOMMENDATION

That, after consultation with the Canupawakpa Dakota First Nation and the Sioux Valley Dakota First Nation, the Government of Canada acquire an appropriate part of the lands once taken up as Turtle Mountain IR 60, to be suitably designated and recognized for the important ancestral burial ground that it is.

FOR THE INDIAN CLAIMS COMMISSION

Roger J. Augustine
Commissioner

Daniel J. Bellegarde
Commissioner

Sheila G. Purdy
Commissioner

Dated this 15th day of July, 2003.

APPENDIX A

CANUPAWAKPA DAKOTA FIRST NATION INQUIRY
TURTLE MOUNTAIN SURRENDER CLAIM

1 Planning conferences

October 17, 2000
February 15, 2001
July 4, 2001

2 Community sessions

Sioux Valley First Nation reserve, December 7, 2001

The Commission heard evidence from Sioux Valley First Nation elders Marina Tacan, Jean Eagle, Wayne Wasicuna, Eva McKay, Aaron McKay, Hector, Don Pratt, Stewart Gordon Wasteste, Kevin Tacan, M. Hotain.

Canupawakpa Dakota First Nation reserve, January 17, 2002

The Commission heard evidence from Canupawakpa Dakota First Nation elders Rosealine Eastman, Frank Eastman, Chief Noella Eagle, Philip HiEagle, Fred Eastman, Agnes Young.

3 Legal arguments

Winnipeg, Manitoba, October 22, 2002
Winnipeg, Manitoba, November 15, 2002

4 Content of formal record

The formal record for the Canupawakpa Dakota First Nation Turtle Mountain Surrender Inquiry consists of the following materials:

- the documentary record (3 volumes of documents, with annotated index) (Exhibit 1)
- Exhibits 2–19 tendered during the inquiry
- transcript of community sessions (2 volumes)
- transcript of oral session (1 volume)
- written submissions of counsel for Canada and counsel for the Canupawakpa Dakota First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

Indian Claims Commission

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